89-247

No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

THE STATE OF COLORADO,

Petitioner,

vs.

JOHN WESLEY LACY, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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ISSUES PRESENTED FOR REVIEW

Under the United States Constitution, when a conviction obtained by guilty plea is challenged because the judge did not fully explain the elements of the charge,

I. can it be presumed that the defendant received a sufficient explanation of the nature of the charge when there is direct evidence that defense counsel explained the charge and no evidence to the contrary?

II. can the factual basis, when read in the presence of a defendant and his counsel, inform the defendant about the nature of the charge and serve as a substitute for a voluntary admission that the defendant had the requisite intent?

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No.

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF COLORADO,

Petitioner,

vs.

JOHN WESLEY LACY, JR.,

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

OPINION BELOW

The trial court's unreported order is included as Appendix A. The unpublished opinion of the Colorado Court of Appeals, *People v. Lacy*, No. 85CA1264 (Colo. App. May 14, 1987), is included as Appendix B. The opinion of the Colorado Supreme Court, *Lacy v. People*, No. 87SC262 (Colo. April 24, 1989) (as modified following petition for rehearing), is attached as Appendix C. (This opinion does not yet appear in a regional reporter.) The Colorado Supreme Court's order of June 5, 1989, denying Colorado's petition for rehearing, is included as Appendix D.

JURISDICTION

The Colorado Supreme Court issued its judgment on April 24, 1989, and denied Colorado's petition for rehearing on June 5, 1989. In its opinion, the court found convictions from Ohio and Washington to have been obtained in violation of the United States Constitution because the courts in those states had not fully advised the respondent about the charges to which he pleaded guilty. Jurisdiction is invoked pursuant to 28 U.S.C. sec. 1257.

CONSTITUTIONAL PROVISIONS

Amendment XIV of the United States Constitution states, in pertinent part:

> No State shall...deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

On February 9, 1985, the respondent, John Wesley Lacy, Jr., attacked and tried to kidnap a woman outside of an Elks Club in Jefferson County, Colorado. Lacy was arrested and charged with attempted kidnapping and assault. On March 25, 1985, he was also charged, under Colorado's habitual criminal statute, with having four prior felony convictions.[1]

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[1]Under Colo. Rev. Stat. sec. 16-13-101(2) (1986), a person convicted of any felony in Colorado who has been three times previously convicted upon separate felony charges shall be

Lacy filed motions to dismiss the habitual criminal counts in March and May of 1985. He challenged four prior convictions, but only two are at issue here.[2]

The first was Lacy's 1980 plea to second degree assault from Spokane County, Washington. Lacy based his claim on the Washington court's failure to explain the mental state element (*i.e.*, knowingly...with intent to commit rape). However, Lacy, who could read, had been given a copy of the information, and it stated the elements of the offense, including the requisite mental state.[3] Lacy acknowledged, in

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adjudged an habitual criminal and punished by incarceration for a life term. Under subsection (1) of this statute, a person who has been twice convicted within ten years shall be incarcerated for a term of 25 to 50 years.

[2]In both of the convictions at issue here, the advisements were complete as to the constitutional rights being waived (to jury trial, to testify or remain silent, to confront witnesses, to compulsory process, to appeal, etc.) and possible penalties, and Lacy was fully examined about whether his pleas were voluntary (Defendant's Exhibit 3, pp. 4-7; Defendant's Exhibit 4, pp. 3-5).

[3]The information read as follows:

> That the defendant, JOHN WESLEY LACY, JR., in Spokane County, Washington, on or about March 6, 1980, with intent to commit the felony of Second Degree Rape, did knowingly assault Geraldine A. Muse, a human being.

the presence of his attorney, that he had spoken with his attorney and understood the charge (Defendant's Exhibit 4, p. 3). Lacy and his attorney also heard the prosecutor give a detailed account of the incident and did not object to this characterization (Defendant's Exhibit 4, pp. 5-7).

The second conviction at issue here was Lacy's 1976 plea to theft from Mahoning County, Ohio. Again, the Ohio court did not explain the elements of the offense. However, Lacy and his attorney both signed a written guilty plea agreement in which they acknowledged that counsel had informed Lacy about the nature of the charge and the maximum penalty. The indictment, attached to the plea agreement, stated the elements of the offense, including that Lacy "with purpose to deprive the owner...knowingly obtained or exerted control...without the consent of Elbee Billup" (People's Exhibit L, p. 2). The indictment was also read before Lacy and counsel in open court (Defendant's Exhibit 3, p. 2).

In his attack on these two convictions, Lacy never alleged or testified that he did not understand the elements of the charges. Nor did he state that, had he been more fully advised, he would have chosen to go to trial.

On June 24, 1985, after taking evidence and hearing arguments, the Jefferson County District Court ruled that three of Lacy's four prior convictions could be used to support an habitual criminal charge (Appendix A). Lacy was convicted of all counts on July 26, 1985, and was sentenced to life imprisonment.

Lacy then turned to the Colorado Court of Appeals. The court of appeals affirmed Lacy's habitual criminal adjudication in an unpublished opinion. It held that each of Lacy's three prior guilty pleas had been properly obtained (Appendix B).

The Colorado Supreme Court, however, reversed, finding two of Lacy's prior convictions invalid. The supreme court, evaluating the guilty pleas under the United States Constitution, held that the Washington and Ohio courts had not sufficiently explained the elements of the offenses before the pleas were entered (Appendix C). It then remanded for imposition of the alternative 4 year sentence, which the trial court announced in case Lacy's habitual criminal adjudication was reversed.

REASONS TO ALLOW THE WRIT

A writ of certiorari should be allowed in this case because the Colorado Supreme Court's decision conflicts with the decisions of this Court and with federal circuit courts on an issue of federal law that recurs frequently and is important. S. Ct. R. 17.1(b) and (c).

I

Under *Henderson v. Morgan*, 426 U.S. 637 (1976), and *Marshall v. Lonberger*, 459 U.S. 422 (1983), both of Lacy's convictions should have been held constitutional. *Henderson* recognizes that defense counsel's explanation of the charges can serve as an alternative to a judicial advisement in satisfying due process requirements:

> Normally the record contains *either* an explanation of the charge by the trial judge, *or* at least a representation by defense counsel that the nature of the offense has been explained to the accused.

Henderson, 426 U.S. at 647 (emphasis added). In both of Lacy's pleas, there was direct and uncontroverted evidence that defense counsel had explained the nature of the offenses to Lacy. The Colorado Supreme Court knew this, but it simply disagreed that this would satisfy due process:

> [A] showing that defense counsel gave some explanation to his client of the charge to which the guilty plea is tendered does not by itself sufficiently demonstrate that the defendant knew the critical elements of the crime when the plea was entered.

Appendix C at 33.

The Colorado Supreme Court's analysis is incorrect. When a defendant and his attorney represent in writing that the defendant has been informed of the nature of the charges, due process is satisfied under *Henderson*. Similarly, the same representation suffices when made to the court by the defendant in his attorney's presence. In both cases, it is fair to presume that counsel would not allow his client to misstate the extent of the advisement given.

Indeed, it is fair to presume that a sufficient explanation was given by counsel even when there is no direct evidence of this in the record:

> Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

Henderson, 426 U.S. at 647; *accord*, *Marshall*, 459 U.S. at 436.

Although the Colorado Supreme Court recognized that such a presumption exists in theory, it did not apply it in Lacy's case. The court indicated that it would not apply such a presumption unless the circumstances were compelling:

> It may be appropriate in some circumstances to presume that the defendant has been adequately informed, either by his lawyers or at some proceeding other than the providency hearing, of the charges on which he was indicted. *Marshall v. Lonberger*, 459 U.S. 422, 436-38 (1983); *Henderson*, 426 U.S. at 647. In *Marshall*, the United States Supreme Court found several factual findings made by the trial court significant to its conclusion that the accused's plea of guilty was voluntary and intelligent. Specifically, the trial court found that the accused was intelligent and experienced in the criminal justice system and was well-represented at all stages of the plea proceedings by competent counsel. In addition, the accused's counsel stipulated at the providency hearing and in the accused's presence that the indictment, which contained an explanation of the charges against him, sustained the plea of guilty. Finally, the transcript of the providency hearing revealed that a person of the accused's intelligence and experience would have understood certain statements made by the presiding judge as referring to the indictment's charge of attempt to kill. *Marshall*, 459 U.S. at

435-38.

Lacy, Appendix C at n. 7, p. 33.

In contrast, the *Henderson* court stated that the presumption applies in "most cases," and would have applied the presumption had it not been presented with a "unique" situation -- a trial court finding that the defendant had not been advised by counsel or the court and evidence to support that finding. Similarly, even the *Marshall* dissent recognized that the *Henderson* presumption applies *"in the absence of proof to the contrary."* *Marshall* at 442, n.2 (Brennan, J., dissenting) (emphasis added). *See also Oppel v. Meachum*, 851 F.2d 34, 38 (2nd Cir. 1988) (presumption applies when the defendant introduces no evidence to the contrary), *citing Worthen v. Meachum*, 842 F.2d 1179 (10th Cir. 1988) (presumption applied where defendant discussed plea with attorney and offered no evidence to rebut presumption that attorney explained the nature of the offense).

Thus, the Colorado Supreme Court stands the *Henderson* presumption upside down. In both of Lacy's guilty pleas, there was direct evidence that Lacy had been advised. In neither case was there evidence to rebut a presumption that these advisements had been sufficient.[4] Moreover even under

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[4]The *Lacy* Court thought the following statement, made by the victim during the Ohio providency hearing, should have prompted the Ohio court to further examine Lacy about his understanding of the charges:

> ...I don't want to press charges against him, because I have let him have the car. He used the car without my consent before, but not this particular time. So I won't press charges against him, if it please the Court.

the Colorado Supreme Court's own restrictive view, the *Henderson* presumption should have been applied here. The circumstances surrounding Lacy's pleas nearly parallel those in *Marshall*: Lacy attended school through the twelfth grade, was highly experienced in the criminal justice system (the oldest conviction at issue here was Lacy's fifth overall and his third for car theft), and was represented at all stages of the plea proceedings (Defendant's Exhibit 1, p. 3; Court's Exhibit 1, pp. 23-24).

II

Lacy's 1980 plea to assault from Washington was condemned by a 4-3 vote of the Colorado Supreme Court. The majority found an insufficient showing that Lacy understood the elements of the offense, particularly the requirement that the assault be done with intent to commit rape.

The dissent, however, thought that Lacy's understanding of the charge could properly be inferred from the circumstances: Lacy admitted that he had choked the victim (Defendant's Exhibit 4, p. 5); he had a copy of the written

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(Defendant's Exhibit 3, p. 4). This statement was ambiguous, and was obviously not understood to mean that Lacy had obtained consent. The Ohio court could reasonably rely on defense counsel not to let his client plead guilty if innocent. Lacy's attorney would not have undergone "extensive negotiations" or requested the plea bargain "as a favor," if Lacy had had permission to take the car because trial would have been a simple matter (Defendant-s Exhibit 3, pp. 2-3). Thus, Billup's statement does not rebut a presumption that Lacy was adequately advised.

information, which listed all of the elements (Court's Exhibit II); he was present for a discussion about whether a "Sexual Psychopathy Petition," should be filed in his case and agreed that it should be filed (Defendant's Exhibit 4, p. 4); Lacy and his attorney heard the prosecutor describe the incident and did not object to the characterization. This description established the sexual nature of the assault:

> [The victim] accepted a ride home and gave Mr. Lacy directions to an apartment house just north of Ferris High School and Mr. Lacy drove her directly from downtown Spokane to the apartment house parking lot. At the parking lot she started to leave the car to go up to the apartment. Mr. Lacy asked her to wait a minute. She was then pulled back into the car and he attempted to kiss her and she struggled and it is indicated he then choked her with his hands around her neck, and she lost consciousness. When she awoke she was laying in the front seat of the car on the floor and observed that there were a number of trees around the area. She believed the car had been moved, and she saw Mr. Lacy in the driver seat of the car masturbating, and when he saw her wake up he then went from his side of the car over to her side and, again, there was a brief struggle. Threats were made that she should comply with his demands or she would be killed, and she then stopped struggling and he was able to partially remove her blouse by unzipping it, and, again, to take her pants down to her ankles. She was then taken from the car out to

> a wooded area. They walked from the car and there, again, more demands were made, and threats were made.
>
> * * *
>
> Also, Mr. Lacy, Your Honor, then did give a statement to detective Teigen, and indicated that he did check her but felt she was still conscious; that her pants were pulled down; that he did have occasion to place his mouth on her breasts; that he was masturbating, and it seems

he feels that he had too much to drink and he got a little crazy.

(Defendant's Exhibit 4, pp. 6-7).

The dissent, not the majority, was correct here. Due process under the United States Constitution requires only that it be fair to conclude that the defendant intelligently and voluntarily waived his trial rights. The concern in *Boykin v. Alabama*, 395 U.S. 238 (1969), was that this Court could not fairly conclude that the defendant had acted intelligently and voluntarily when he pleaded guilty to 5 charges, each of which could bring death, without any indication that he had been advised about his rights or the possible penalties. Similarly, it was not possible to fairly conclude that the defendant in *Henderson* had waived his trial rights voluntarily and intelligently when all indications were that he had never been advised about the charges.

But in *Lacy*, such a conclusion is fair. Lacy knew what he was giving up and what he was getting. He and his attorney agreed to the plea in exchange for sentence

concessions; he admitted assaulting the victim; he and his attorney acquiesced in the prosecutor's reading of the factual basis. That he was never advised by the judge about the requirement of intent to rape is a meaningless deficiency when it was clear what the charge was about. Lacy could not have spoken with his attorney, read the information, and heard the prosecutor's version of events without knowing that intent to rape was part of the charge.

The circumstances of Lacy's Washington plea, taken together, constitute the "substitute for a voluntary admission" recognized by this Court:

> There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respondent had the requisite intent. Defense counsel did not purport to stipulate to that fact; they did not explain to him that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent.

Henderson, at 646. *Lacy* conflicts with *Henderson* because it rejects the idea that a defendant can be informed about the mental state requirement in a variety of ways. Its form-over-substance ruling unfairly elevates due process requirements of the United States Constitution beyond the levels required by *Boykin* and *Henderson*. *Lacy* thus conflicts with the decisions of this Court.

III

Lacy is important because it affects critical areas of the criminal justice system. The manner in which guilty pleas are taken, the extent to which they can be relied on as final judgments, the state's ability to use guilty pleas for sentence enhancement and impeachment, and the respect normally accorded judgments of sister states are all affected.

Under *Lacy*, it is more important for judges to say certain words during advisements than to ascertain whether defendants actually understand what they are facing. No deference is given to a judge's finding of an understanding plea when that is based on observations about the defendant's experience and demeanor and the competence of his attorney. Instead, under the United States Constitution, formal litanies are now required. To the extent that lower courts conform to meet the *Lacy* standard of review, providency hearings will be less based on reality and more on ritual.

Lacy also upsets the finality of judgments. Unless the *Henderson* presumption is given force, guilty pleas can be overturned for technical flaws in advisements. Convictions which were once reliable can be overturned on collateral attack. Such challenges may come years after a plea is made; and by then, it is virtually impossible to meet *Lacy's* standard of review: documents are destroyed, witnesses are difficult to locate, memories fade. This is highly significant because the vast majority of convictions are obtained through pleas. "In practice, guilty pleas account for roughly 90 per cent of all criminal convictions." D. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial*, p. 8 (F. Remington, ed. 1966). And if states cannot effectively combat collateral attacks under a *Lacy* standard of review, neither can they afford to try those who are released. Even

when the evidence is not stale, the cost of diverting resources -- prosecutors, public defenders, judges, clerks -- from current matters is prohibitive.

Lacy impairs the ability of states to combat recidivism because it weakens the extent to which states can rely on criminal convictions for sentence enhancement. It is of utmost importance that the states have tools to protect society against the harm caused by recurrent criminality. This court has recognized the importance of policies underlying habitual offender statutes, which exist in many jurisdictions. *Rummel v. Estelle*, 445 U.S. 263, 276 (1980). These policies are undermined when otherwise reliable determinations of previous guilt are discarded on the technical grounds at issue here. It is not merely that many more prior convictions will be invalidated. It is also that, in situations such as *Lacy*, the convictions are invalidated when there is no serious question that the defendant did the acts for which he was convicted. Further, schemes other than habitual criminal statutes are also affected.[5]

Similarly, *Lacy* impairs the use of prior convictions for impeachment purposes. That convicted felons tend to be unreliable witnesses, and that their credibility can be impeached during testimony is a legitimate policy decision made by many state legislatures.[6] *Lacy* frustrates this policy by allowing many convictions to be unfairly invalidated. This can have real consequences: a former convict will lie not only on his own behalf but will lie to acquit his friends as well.

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[5]For example, Colo. Rev. Stat. 16-11-201(2) disqualifies those who have two prior felony convictions from receiving probation.

[6]E.g., Colo. Rev. Stat. 13-90-101.

Finally, *Lacy* erodes the respect which is normally accorded the judgments of sister states and makes conflict between the states more likely. If Lacy, for example, is arrested for a crime in Georgia and charged under that state's habitual offender statute, the question will arise whether his convictions from Ohio and Washington are valid. Certainly, the convictions are still valid in Ohio and Washington. And just as clearly, they are invalid in Colorado. Georgia will necessarily have to reject the judgment of one or more states, judgments that were purportedly rendered under due process standards of the United States Constitution that should be the same for all.

The United States Supreme Court has not written on the applicability of the *Henderson* presumption since *Marshall v. Lonberger*. As *Lacy* indicates, there is a real need for guidance. It is clear after *Henderson* that courts cannot presume a sufficient advisement when all the evidence points otherwise. And it is clear after *Marshall* that the presumption applies in some circumstances. But it is not clear, at least to the Colorado Supreme Court, that the *Henderson* presumption really does imply, in the absence of evidence to the contrary, that a represented defendant has been advised sufficient to satisfy due process under the United States Constitution.

CONCLUSION

Because this case is important to the operation of the criminal justice system, and because there is a need for authoritative guidance in this area, the United States Supreme Court should issue a writ of certiorari.

Respectfully submitted,

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APPENDIX A

DISTRICT COURT, JEFFERSON COUNTY COLORADO
Case No. 85 CR 0249 - Division 3

ORDER

THE PEOPLE OF THE STATE OF COLORADO,
vs.
JOHN WESLEY LACY, JR.,

DEFENDANT.

This matter is before the Court on a motion to dismiss habitual criminal counts filed by the defendant, on a supplemental motion to dismiss habitual criminal counts filed by the defendant, and on a motion to strike defendant's supplemental motion to dismiss habitual criminal counts filed by the People. The Court has heard evidence and has heard extensive arguments and now makes the following findings of fact, conclusions of law and orders:

* * *

On February 11, 1976, the defendant entered a plea of guilty before Judge Clyde W. Osborne in the Court of Common Pleas, Mahoning County, State of Ohio. At that time Judge Osborne had before him a written plea of guilty, and the defendant personally appeared before Judge Osborne and entered his plea of guilty. From the proceedings in open court and the written plea of guilty, which was before the Judge at the time of taking the plea of guilty, the Court finds that the defendant was advised of the nature of the charge, the maximum penalty or penalties, the effect of his guilty plea, of his right to a trial by jury, of his right to confront witnesses, of his right to have compulsory process for obtaining witnesses,

of the right to have the State prove the charges beyond a reasonable doubt, of his right to remain silent, and of his right to an appeal. The defendant was represented by counsel and waived his rights and entered a plea of guilty in open court while being represented by an attorney.

The Court finds from these facts that the defendant's plea of guilty on February 11, 1976, was voluntary and that the defendant was advised as to his Constitutional rights before entering that plea.

On June 6, 1980, the defendant entered a plea of guilty in the Superior Court in and for the County of Spokane, State of Washington, before Judge Donald N. Olson. The defendant was represented by counsel. He acknowledged that he knew he was charged with the crime of second degree assault, he was advised as to the possible penalties, was advised of his right to a trial by jury, was advised of his right to have a lawyer and that if he couldn't afford one, one would be appointed, was advised of his right of confrontation, was advised of his right to call witnesses, was advised of his right to testify, was advised of his right to remain silent, was advised that the State must prove the charges beyond a reasonable doubt and was advised of his right to appeal. After being advised of these rights, the District Attorney made a detailed statement of the facts he would prove if the case were to go to trial.

The Court finds from these facts that the defendant's plea of guilty on June 6, 1980, was voluntary and that the defendant was advised as to his Constitutional rights before entering that plea.

CONCLUSIONS OF LAW

In the case of People v. Van Hook, 36 Colo. App. 226; 539 P.2d 507, the Trial Court apparently relied solely on a written plea of guilty by the defendant. The Court of Appeals said:

> "Secondly, we hold that under the law of Sandoval and Kelly, supra, and precursors thereto, compliance with Crim. P. 11 cannot be demonstrated solely by reliance upon a printed form. See People v. Sanders, 185 Colo. 356, 524 P.2d 299. In Kelly it is stated that:
>
> Before a trial court accepts a plea of guilty or a nolo contendere plea, it must ascertain that the defendant has been advised of his rights as an accused person; that he is waiving those rights; that he understands the nature and elements of the charge involved; that he understands the possible penalty or penalties which may be imposed; and that his plea is voluntary and not the result of undue influence or coercion on the part of anyone."

It is the opinion of this Court that the decision in Van Hook was not meant to preclude the use of a written plea of guilty, but was meant only to prohibit the use of a written plea without any oral explanation by the Court. In this case it is clear from a combination of the written plea and the oral advisements given by the judge in three of our four cases that the defendant was adequately advised of his Constitutional rights.

The question has been raised as to what law should be applied in determining whether a defendant has been properly advised of his Constitutional rights. It is clear that the plea must meet Federal Constitutional standards as set forth in Boykin v. Alabama, 395 U.S. 242; 89 S.Ct. 1709.

It is also clear that the pleas must meet the Constitutional standards of the states in which the pleas were entered.

Defense counsel has furnished to the Court information as to the standards in Ohio and Washington on the dates in question. The District Attorney has furnished no information to the contrary.

It is also clear that the plea of guilty must meet the standards of the state in which the pleas are offered in evidence, in this case Colorado.

This Court concludes that the pleas of guilty involved in the fourth, fifth and sixth counts do meet the standards set forth by the Supreme Court of the United States, the statutes decisions and rules in the state of Ohio, by the statutes, decisions and rules in the state of Washington, and by the statutes, decisions and rules in the state of Colorado.

ORDER

It is ordered by the Court as follows:

1. The motion to strike defendant's supplemental motion to dismiss habitual criminal counts is denied.

2. The defendant's motion to dismiss habitual criminal counts is granted as to count three of the Information and is denied as to counts four, five and six of the Information.

Dated this 24th day of June, 1985.

BY THE COURT:

WINSTON W. WOLVINGTON, Judge

APPENDIX B

COLORADO COURT OF APPEALS
No. 85CA1264

THE PEOPLE OF THE STATE OF COLORADO
Plaintiff-Appellee,

v.

JOHN WESLEY LACY,
Defendant-Appellant.

Appeal from the District Court of Jefferson County
Honorable Winston W. Wolvington, Judge

DIVISION III JUDGMENT AFFIRMED
May 14, 1987
Opinion by JUDGE CRISWELL
Van Cise and Sternberg, JJ., concur

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NOT SELECTED FOR PUBLICATION

Defendant, John Wesley Lacy, was convicted of attempted kidnapping, third degree assault, and three habitual criminal counts. He appeals from the judgment of conviction of each of the habitual criminal charges. We affirm.

Defendant contends that, in the case of each of the three prior convictions, a guilty plea was accepted without him being provided with sufficient advice respecting the charge. We disagree.

There was no testimony with respect to any of the prior guilty pleas. However, certified records of each of the earlier proceedings, including various transcripts, were received as evidence. From an examination of these, the court concluded each of the pleas of guilty met:

> "the standards set forth by the Supreme Court of the United States, the statutes, decisions and rules in the State of Ohio, by the statutes, decisions and rules in the State of Washington, and by the statutes, decisions and rules in the State of Colorado."

A defendant seeking to set aside a prior conviction obtained as a result of the entry of a guilty plea must initially make a prima facie showing that the guilty plea was constitutionally infirm; only when defendant has satisfied this initial evidentiary requirement is the prosecution required to establish by a preponderance of the evidence that the guilty plea did not violate constitutional due process standards. People v. Wade, 708 P.2d 1366 (Colo. 1985). Tested against this standard, the trial court's conclusions are correct.

The record of defendant's 1973 Ohio conviction for operating a motor vehicle without the owner's consent includes a written plea of guilty, signed by defendant and his attorney, which recites that he had been fully informed by his counsel and the court of the nature of the charge and all his constitutional rights. A copy of the indictment is attached, which describes in statutory language the elements of the offense charged. The transcript indicates that defendant appeared in open court with his attorney and, after acknowledging that he was able to read, entered his guilty plea.

This record established, prima facie, that defendant was adequately advised, see Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and no evidence was produced which overcame such prima facie showing.

II.

The record of defendant's 1976 Ohio conviction of theft includes a transcript of the providency hearing, a copy of the indictment, and a copy of the written plea of guilty. It reflects that the prosecutor read the indictment, which identified the specific item that was taken; the name of the owner of that item; the fact that it was of a value greater than $150; that the act was done with the purpose of depriving the owner of that item; and that defendant knowingly obtained and exercised control over that item. The written plea of guilty, signed by defendant and his attorney, states that defendant had been informed by his counsel and by the court of the nature of the charge against him. Thus, the
record supports the trial court's finding that defendant was properly advised of the elements of the offense, including the element of a specific intent or purpose.

Here, the reading of the charge, including the allegation that the act was committed with the purpose or

intention of depriving the owner, satisfies the requirement that critical elements of the crime charged must be explained in terms understandable to defendant. Unless the language of the charge is highly technical, no more full explanation of the substantive crime need be given than the charge itself. People v. Gorniak, 197 Colo. 289, 593 P.2d 349 (1979). There is no indication that defendant did not have a proper understanding of the charge, including the mens rea.

III.

The record of defendant's 1980 Washington conviction of second degree assault includes a transcript confirming that defendant was represented by an assistant public defender; that the warrant was read to him; that defendant and his attorney received a copy of the information; that his constitutional rights were described; and that defendant specifically acknowledged that he choked the victim. The prosecutor provided a narrative description of the specific conduct constituting the offense and, in addition, a printed form signed by the judge reflected that defendant was informed and understood the nature of the charge.

This record also established an unrebutted prima facie showing that defendant's plea was providently entered. People v. Randolph, 175 Colo. 454, 488 P.2d 203 (1971).

In the case of each of defendant's guilty pleas, therefore, the record indicates that it was entered knowingly, intelligently, and voluntarily and, thus, met the test set out in Boykin v. Alabama, supra.

Judgment affirmed.

JUDGE VAN CISE and JUDGE STERNBERG concur.

APPENDIX C

SUPREME COURT, STATE OF COLORADO

No. 87SC262 April 24, 1989

JOHN WESLEY LACY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO

Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED AND CASE REMANDED

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JUSTICE LOHR delivered the Opinion of the Court.
JUSTICE VOLLACK concurs in part and dissents in part;

JUSTICE ROVIRA and JUSTICE MULLARKEY join in the concurrence and dissent.

We granted certiorari to review an unpublished decision of the Colorado Court of Appeals affirming the conviction of defendant-petitioner John Wesley Lacy, Jr., on three habitual criminal counts. The court of appeals upheld the trial court's denial of the defendant's motion to dismiss the habitual criminal counts at issue in this petition. The defendant asserts on certiorari that his guilty pleas to the charges underlying the habitual criminal counts were constitutionally infirm. We conclude that two of these convictions were based on constitutionally infirm pleas of guilty and could not be used as predicates for habitual criminality charges. Since at least two habitual criminal counts must be proved before a defendant can be adjudged a habitual criminal and therefore subject to mandatory increased sentencing, see §16-13-101, 8A C.R.S. (1986), we need not address the validity of the defendant's plea underlying the single remaining habitual criminal count. We therefore reverse the judgment and remand the case for resentencing.

I.

The defendant was initially charged in a two-count information alleging attempted second degree kidnapping, which is a class five felony, and assault in the third degree,[1] which is a class one misdemeanor. These charges arose out of an attempted abduction that occurred in the early morning on February 9, 1985, outside of the Elks Club in Arvada, Colorado. The victim testified at trial that after leaving her job at the Elks Club and waiting in the parking lot for her car

[1] §18-3-204, 8B C.R.S. (1986).

to warm up, Lacy approached her and pushed her into the car. During the subsequent struggle Lacy covered the victim's mouth to keep her from screaming and punched her in the face. While Lacy was attempting to get the car into gear, the victim managed to escape from the vehicle and run away.

On March 25, 1985, the information was amended to add four habitual criminal counts, §16-13-101(2), 8A C.R.S. (1986), alleging prior felony convictions in 1967, 1973, 1976, and 1980.[2] Lacy moved to dismiss the habitual criminal counts, contending that the guilty pleas supplying the bases for the convictions underlying the habitual criminal counts were accepted in violation of his constitutional rights and state law prescribing procedures for accepting guilty pleas. The trial court received into evidence certified records of each of the earlier proceedings, including transcripts of the providency hearings at which the pleas were entered. The trial court took no testimony with respect to any of the prior guilty pleas, although it did hear extensive arguments directed toward the question of their validity. On June 24, 1985, the trial court dismissed the habitual criminal count relating to the 1967

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[2] §§16-13-101 to -103, 8A C.R.S. (1986 & 1988 Supp.), provide for mandatory increased sentencing in cases involving persons adjudicated as habitual criminals. Under §16-13-101(2), a person convicted in Colorado of any felony who has been three times previously convicted upon separate felony charges shall be adjudged a habitual criminal and punished by imprisonment in a correctional facility for a life term. Under §16-13-101(1), a person convicted in Colorado of certain felonies who within ten years of the commission of the instant offense has been twice previously convicted on separate felony charges shall be adjudged a habitual criminal and punished by confinement in a correctional facility for a term ranging from twenty-five to fifty years.

conviction and denied the defendant's motion as to the remaining counts. Specifically, the court concluded that the guilty pleas underlying the remaining counts met "the standards set forth by the Supreme Court of the United States, the statutes, decisions and rules in the [states in which the pleas were taken] and by the statutes, decisions and rules in the state of Colorado."

Trial to a jury began on July 23, 1985. The jury found the defendant guilty of attempted kidnapping and third degree assault, and also found that the defendant had been convicted of a felony on each of three prior occasions as charged in the three remaining habitual criminal counts. The trial court sentenced Lacy to the Department of Corrections for a term of life imprisonment. At the sentencing hearing, the trial judge imposed an alternative sentence of four years to take effect in the event the habitual criminal adjudication were to be overturned on appeal.

Lacy appealed to the Colorado Court of Appeals, challenging the constitutional validity of each of the three convictions that formed the basis of his adjudication as a habitual criminal. In an unpublished opinion, the court of appeals rejected his challenges to the guilty pleas underlying the habitual criminal counts and therefore affirmed the judgment of conviction. The court held that the record supported a finding that each of Lacy's guilty pleas was entered knowingly, intelligently, and voluntarily.

Lacy then sought certiorari review in this court. He specifically assigns as error the trial court's refusal to dismiss the habitual criminal counts relating to the felony convictions obtained in 1973, 1976, and 1980. He asserts that these convictions were based on constitutionally defective guilty pleas and therefore were obtained in violation of due process of law. U.S. Const. amend. XIV; Colo. Const. art. II, sec. 25. As to

the convictions obtained in 1976 and 1980, we agree. We find it unnecessary to address the validity of the conviction obtained in 1973.

II.

A.

A prior conviction obtained in a constitutionally invalid manner cannot be used against an accused in a subsequent criminal proceeding to support guilt or to increase punishment. E.g., Loper v. Beto, 405 U.S. 473, 481 (1972); Burgett v. Texas, 389 U.S. 109 (1967); Watkins v. People, 655 P.2d 834, 837 (Colo. 1982); People v. Quintana, 634 P.2d 413, 416 (Colo. 1981). We therefore must determine whether Lacy's prior convictions comply with constitutional standards. See People v. Meyers, 617 P.2d 808, 814-15 (Colo. 1980).[3]

Due process of law requires that in order to provide the basis for a judgment of conviction, a guilty plea must be made voluntarily. Henderson v. Morgan, 426 U.S. 637 (1976); Boykin v. Alabama, 395 U.S. 238 (1969); People v. Chavez, 730 P.2d 321 (Colo. 1986); Wilson v. People, 708 P.2d 792 (Colo. 1985); Harshfield v. People, 697 P.2d 391 (Colo. 1985); People v. Leonard, 673 P.2d 37 (Colo. 1983); U.S. Const.

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[3] In reviewing the validity of the guilty pleas underlying Lacy's prior convictions, we need not reach the question of their validity under the statutory and case law in the states in which the pleas were taken. This is so because the relevant inquiry for due process purposes is whether a conviction used to support guilt or increase punishment is constitutionally infirm. Compliance with state law is not necessarily equivalent to the satisfaction of constitutional requirements. See People v. Meyers, 617 P.2d 808 (Colo. 1980) (evaluating validity of out-of-state guilty plea by constitutional standards); People v. Wieghard, 709 P.2d 81 (Colo. App. 1985) (same).

amend. XIV; Colo. Const. art. II, sec. 25. A guilty plea may be involuntary in the constitutional sense for one of two reasons. First, a plea may be involuntary because the defendant does not understand the nature of the constitutional protections he is waiving. Henderson, 426 U.S. at 645 n.13; Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). Alternatively, a plea may be involuntary because the defendant "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Henderson, 426 U.S. at 645 n. 13. In the latter case, a plea is not voluntary unless the defendant received "'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" Henderson, 426 U.S. at 645 (quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941)).

To establish that the constitutional requirement of voluntariness has been satisfied, the record as a whole must affirmatively demonstrate that the defendant understood the constitutional rights he was waiving and the critical elements of the crime to which the plea was tendered. People v. Wade, 708 P.2d 1366, 1368-69 (Colo. 1985); Harshfield, 697 P.2d at 393; People v. Keenan, 185 Colo. 317, 319, 524 P.2d 604, 605 (1974). A reviewing court cannot presume from the mere fact that a guilty plea was entered that the defendant waived his constitutional rights and understood the critical elements of the crime with which he was charged. Boykin, 395 U.S. at 242-43; Wade, 708 P.2d at 1368-69.

1.

As to the requirement that the defendant understand the nature of the constitutional protections he is waiving, we have previously held that the trial court need not follow a formalistic litany when accepting a guilty plea. E.g., Wade, 708 P.2d at 1368. Rather, the record as a whole must simply show

that the defendant entered his guilty plea voluntarily and understandingly. Wade, 708 P.2d at 1368-69; Keenan, 185 Colo. at 319, 524 P.2d at 605; People v. Marsh, 183 Colo. 258, 263, 516 P.2d 431, 433 (1973). Moreover, due process does not require a specific waiver of even the three constitutional rights highlighted in Boykin v. Alabama, 395 U.S. 238.[4] Wade, 708 P.2d at 1369; Marsh, 183 Colo. at 262-63, 516 P.2d at 433; see generally J. Bond, Plea Bargaining and Guilty Pleas §3.8(b)(1983)(a majority of courts have refused to vacate pleas simply because the record does not affirmatively show a specific waiver of the three constitutional rights referred to in Boykin). Thus, we have rejected an assertion that "when the record of providency proceedings contains no evidence of any reference to the prosecution's burden of proof in criminal trials, any guilty plea accepted during such proceedings must be deemed constitutionally invalid." Wade, 708 P.2d at 1370.

Nor does due process generally require that the record demonstrate an adequate factual basis for the plea. See McCarthy v. United States, 394 U.S. 459, 465 (1969)(procedure embodied in Rule 11 of the Federal Rules of Criminal Procedure, which directs court to determine that factual basis exists for guilty plea, has not been held to be constitutionally mandated); Smith v. McCotter, 786 F.2d 697, 702-03 (5th Cir. 1986); Rodriguez v. Ricketts, 777 F.2d 527, 528 (9th Cir. 1985); Willbright v. Smith, 745 F.2d 779, 780 (2d Cir. 1984); Paulsen v. Manson, 525 A.2d 1315, 1318 (Conn. 1987); see also 2 W. LaFave & J. Israel, Criminal Procedure §20.4(f)

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[4] In Boykin, the United States Supreme Court specified three constitutional rights waived by a defendant who tenders a guilty plea: the privilege against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers. 395 U.S. at 243.

(1984 & 1989 Supp.).[5] The situation may be otherwise where a plea is entered under circumstances where the defendant insists that he is innocent. See North Carolina v. Alford, 400 U.S. 25 (1970).[6]

2.

As to the requirement that the defendant understand the nature of the charges against him, the record must affirmatively demonstrate the defendant's understanding of the critical elements of the crime to which the plea is tendered. E.g., Harshfield, 697 P.2d at 393; Leonard, 673 P.2d at 39; Watkins, 655 P.2d at 837; see also ABA Standards for Criminal Justice, Standard 14-1.4 (2d ed. 1980). In order to satisfy the requirement, the court should explain the critical elements "'in terms which are understandable to the defendant.'" Watkins, 655 P.2d at 837 (quoting People v. Cumby, 178 Colo. 31, 33,

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[5] A number of our opinions contain statements to the effect that a guilty plea cannot be accepted absent a record affirmatively showing a factual basis for the plea. See Wilson v. People, 708 P.2d 792, 798 (Colo. 1985); People v. Murdock, 187 Colo. 418, 419, 532 P.2d 43, 44 (1975); People v. Alvarez, 181 Colo. 213, 217, 508 P.2d 1267, 1270 (1973). However, in these cases the requirement that a factual basis support the plea appears to find its source in Crim. P. 11, not in the state or federal constitution.

[6] Under these circumstances, at least one federal circuit court has held that a judge must inquire fully into the facts to determine that a factual basis exists for the plea as "an essential part of the constitutionally-required finding of a voluntary and intelligent decision to plead guilty." Willett v. State, 608 F./2d 538, 540 (5th Cir. 1979); see generally J. Bond, Plea Bargaining and Guilty Pleas §3.55(c)(3) (2d ed. 1982).

495 P.2d 223, 224 (1972)).

Our cases have recognized that the degree of explanation that a court should provide depends on the nature and complexity of the crime and that no particular litany need be followed in accepting a tendered plea of guilty. Harshfield, 697 P.2d at 394; Leonard, 673 P.2d at 39. However, a showing that defense counsel gave some explanation to his client of the charge to which the guilty plea is tendered does not by itself sufficiently demonstrate that the defendant knew the critical elements of the crime when the plea was entered. Watkins, 655 P.2d at 837; People v. Mason, Jr., 176 Colo. 544, 545-46, 491 P.2d 1383, 1383-84 (1971).[7]

Where the crime to which the plea is entered is

[7] It may be appropriate in some circumstances to presume that the defendant has been adequately informed, either by his lawyers or at some proceeding other than the providency hearing, of the charges on which he was indicted. Marshall v. Lonberger, 459 U.S. 422, 436-38 (1983); Henderson, 426 U.S. at 647. In Marshall, the United States Supreme Court found several factual findings made by the trial court significant to its conclusion that the accused's plea of guilty was voluntary and intelligent. Specifically, the trial court found that the accused was intelligent and experienced in the criminal justice system and was well-represented at all stages of the plea proceedings by competent counsel. In addition, the accused's counsel stipulated at the providency hearing and in the accused's presence that the indictment, which contained an explanation of the charges against him, sustained the plea of guilty. Finally, the transcript of the providency hearing revealed that a person of the accused's intelligence and experience would have understood certain statements made by the presiding judge as referring to the indictment's charge of attempt to kill. Marshall, 459 U.S. at 435-38.

relatively simple, reading the information to the defendant is an acceptable method of advising him of the nature of the offense charged. People v. Trujillo, 731 P.2d 649, 651 (Colo. 1986); Leonard, 673 P.2d at 39; see also People v. Muniz, 667 P.2d 1377, 1382-83 (Colo. 1983). Thus, further explanation is unnecessary where the crime is "'readily understandable to a person of ordinary intelligence from a mere reading of the information without further explanation by the court.'" Leonard, 673 P.2d at 39 (quoting Muniz, 667 P.2d at 1383). Offenses that we have considered to be understandable by persons of ordinary intelligence include aggravated robbery, Wright v. People, 690 P.2d 1257 (Colo. 1984); People v. Edwards, 186 Colo. 129, 526 P.2d 144 (1974), and second degree murder, People v. Gorniak, 197 Colo. 289, 593 P.2d 349 (1979).

Crimes of greater complexity require a greater showing of the defendant's understanding of the critical elements of the crime to which the plea is entered. Leonard, 673 P.2d at 39. Offenses that we have considered to be of greater complexity include conspiracy to commit burglary, Leonard, 673 P.2d at 41-42; Muniz, 667 P.2d at 1383-84, breaking and entering a motor vehicle with intent to commit the crime of larceny, Harshfield, 697 P.2d at 395, conspiracy to commit escape, Watkins, 655 P.2d at 838, and assault to rob, People v. Sanders, 185 Colo. 356, 524 P.2d 299 (1974).

Regardless of the complexity of the crime, however, the record must demonstrate that the defendant understood any mental state element of the crime to which he pled guilty. See Harshfield, 697 P.2d at 394-95; Gorniak, 197 Colo. at 291-92, 593 P.2d at 350-51; Wilson, 708 P.2d at 796-97. Moreover, an inquiry by the court into whether the defendant understands the nature of charges against him is of utmost importance in connection with charges requiring proof of specific intent.

People v. Kelley, 189 Colo. 31, 536 P.2d 39 (1975).

B.

A defendant attacking the constitutionality of a prior conviction in habitual criminal proceedings must make a prima facie showing that the guilty plea was unconstitutionally obtained. Wade, 708 P.2d at 1368; Watkins, 655 P.2d at 837; Quintana, 634 P.2d at 416. A prima facie showing means evidence that when considered in a light most favorable to the defendant, will permit the court to conclude that the conviction failed to meet relevant constitutional standards. Watkins, 655 P.2d at 837. Once a prima facie showing is made, the conviction is not admissible unless the prosecution establishes by a preponderance of the evidence that the conviction was obtained in accordance with the defendant's constitutional rights. Wade, 708 P.2d at 1368; Watkins, 655 P.2d at 837; Quintana, 634 P.2d at 416.

III.

A.

The facts pertinent to the resolution of the issues before us are taken from the documents and transcripts relating to the defendant's prior convictions. We turn first to the guilty plea entered in Spokane County, Washington, on June 6, 1980, to a charge of second degree assault. The record of this conviction includes a copy of the information and a transcript of the providency hearing, at which Lacy appeared and was represented by an assistant public defender.

At the outset of the hearing, the prosecutor represented that "the warrant has been read"[8] and that the defendant and his counsel had received a copy of the information. The information states the charge as follows: "That the defendant, JOHN WESLEY LACY, JR., in Spokane County, Washington, on or about March 6, 1980, with intent to commit the felony of Second Degree Rape, did knowingly assault Geraldine A. Muse, a human being." The transcript of the hearing reveals that the following exchange took place between the court and Lacy concerning the nature of the charge to which he was offering a plea of guilty:

> THE COURT: You are appearing here with your attorney, Mr. Hemingway; you have talked to him about this; you understand this charge?
>
> MR. LACY: Yes, sir.
>
> THE COURT: You know that you're accused of the crime of Second Degree Assault, and that the maximum sentence for this is ten years?
>
> MR. LACY: Yes.

The court then informed the defendant of the possible penalties upon conviction and of his constitutional rights, and obtained his acknowledgement that he understood these matters and also understood that by pleading guilty he would waive his constitutional rights. The defendant then offered his

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[8] The record does not appear to contain a record of the "warrant" referred to by the prosecuting attorney.

plea of guilty and acknowledged that it was made freely and voluntarily and was not based on threats or promises. The court noted that the defendant acknowledged that when earlier asked to state what he did that caused the charge to be filed, the defendant said he choked the victim. Thereafter, the prosecuting attorney, in Lacy's presence, described in some detail the facts of the case as they were set forth in a report.

Lacy claims that this plea was invalid for two reasons: First, that he was not informed that the prosecution would have to prove all of the elements of the crime beyond a reasonable doubt; second, that he was not informed of the mental state necessary to commit the crime of second degree assault.

We reject Lacy's contention that the Spokane County Superior Court's failure to advise him of the prosecution's burden of proof renders his plea constitutionally infirm. This claim was resolved adversely to Lacy in our decision of People v. Wade, 708 P.2d at 1370, and we adhere to the view expressed in that opinion that due process does not require specific advisement of the prosecution's burden of proof in criminal trials. However, we conclude that the defendant's 1980 conviction is constitutionally infirm because the record does not establish that Lacy understood the critical mental state element of the crime with which he was charged.

The transcript of the 1980 providency hearing, at which the defendant pled guilty, fails to show that the court explained to Lacy any of the elements of the crime of second degree assault. The crime of second degree assault as it was defined in the information included the following critical elements: (1) knowingly assaulting a human being, (2) with intent to commit the felony of second degree rape. The record contains no showing that the court made even a general effort to explain the mental states critical to the offense of second degree

assault or to describe in any way the elements of the crime of second degree rape. In our view, the defendant's affirmative response to the court's inquiry whether he had spoken to his attorney and understood the charge does not establish that he understood the critical elements of that charge. Nor do we regard this crime as having elements that are understandable from a bare reading of the information without further explanation. Indeed, the defendant's own assertion at the providency hearing that he was accused of "choking" the victim strongly suggests that he was confused about the precise nature of the crime to which he pled guilty. As noted earlier, a court's inquiry into the defendant's understanding of the nature of the charges against him is of the greatest importance where, as here, the charges require proof of specific intent. People v. Kelley, 189 Colo. 31, 536 P.2d 39 (1975).

Based on the record before us, we conclude that the defendant made a prima facie showing that he lacked an understanding of the nature and elements of the crime of second degree assault. See Watkins, 655 P.2d at 837. The prosecution produced no evidence to carry its burden to show that the conviction was constitutionally obtained. See id. We therefore conclude that the trial court erred in denying Lacy's motion to dismiss the habitual criminal count relating to the 1980 felony conviction.

B.

We next consider the guilty plea entered by Lacy in Mahoning County, Ohio, on February 11, 1976, to a charge of theft. The record relating to this conviction includes a copy of the indictment, a copy of the written plea of guilty, and a transcript of the providency hearing. The indictment charges Lacy with having knowingly obtained or exerted control over a 1964 Pontiac Catalina owned by one Elbee Billup, without the consent of Elbee Billup or a person authorized to give

such consent, and with the purpose to deprive Billup of the car. The written plea of guilty, signed by Lacy and his attorney, states that Lacy had been informed by his counsel and by the court of the nature of the charge against him.[9]

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[9] The typewritten form reads as follows:

I, John Lacy, being this day before the Court with my counsel. . . and having been informed by my counsel and by the Court of all of my constitutional rights, including the following:

1. The nature of the charge or charges against me and the maximum penalty or penalties involved.
2. The effect of a guilty or no contest plea and that the Court may proceed with judgment and sentence.
3. That by my plea, I am waiving my right to a jury trial; my right to confront witnesses against me; my right to have compulsory process for obtaining witnesses in my favor; my right to require the State of Ohio to prove my guilt beyond a reasonable doubt at a trial where I can not be compelled to testify against myself, and if I elect not to testify, the Prosecuting Attorney, the Court or no one else can comment on my failure to so testify.
4. That if I were tried and convicted, that I would have a right to appeal and to have an attorney appointed to prosecute such appeal if I am indigent.

I hereby waive and reject all of these rights and withdraw my former plea of "not guilty" and enter my plea of "guilty" to the indictment charging me with the following: 2913.02(A)(1) -- Theft (F4) 6mo-1-1 1/2 to 5.

The transcript of the providency hearing, at which Lacy was present, reveals that the prosecuting attorney read the charge aloud. The victim, Elbee Billup, appeared at the hearing and stated: "As long as [Lacy] agreed to pay the damage to my car, naturally, I don't want to press charges against him, because I have let him have the car. He used the car without my consent before, but not this particular time. So I won't press charges against him, if it please the Court." The trial court then engaged in the following exchange with the defendant:

> [THE COURT]: All right, Mr. Lacy, the charge here is a felony of the fourth degree; it's the less serious of all of our felonies. However, it is still a serious charge. And the charge is, as [the prosecuting attorney] has stated, that you very, very briefly took Mr. Billup's car without his consent on the 7th of November?
>
> [THE DEFENDANT]: Right.
>
> [THE COURT]: And, of course, if you did that, then you are guilty of this crime. By pleading guilty to it, you put yourself in a position where you are subject to a sentence of imprisonment of not less than six months, nor more than five years. Now this can be six months,

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This plea is voluntarily made and is not the result of any coercion or intimidation. No promises have been made to me by anyone to secure the above pleas.

I am able to read, have read, and fully understand the foregoing.

one year, one and one-half years up to two years and a maximum of five years, do you understand that?

[THE DEFENDANT]: Yes.

The judge then explained to Lacy the constitutional rights he would waive by pleading guilty. Lacy acknowledged that he was voluntarily entering his plea and that he had signed the written plea of guilty. The court then accepted the plea.

Lacy contends that the court's failure to explain to him the critical elements of the crime with which he as charged renders the plea constitutionally defective. He also asserts that the plea was without a factual basis and therefore should have been rejected. We conclude that the defendant made a prima facie showing of the constitutional invalidity of his plea and that the prosecution failed to carry its resulting burden to establish that the plea was not constitutionally infirm. See Watkins, 655 P.2d 837.

Like the crime of second degree assault with intent to rape, the theft charge to which Lacy pled guilty in 1976 is a specific intent crime and its elements are not readily understandable without further explanation. The record of the February 11, 1976, providency hearing is entirely devoid of any accurate or understandable explanation of the charge. Although the prosecuting attorney read the charge in Lacy's presence as it was described in the indictment, the only explanation directed specifically to the defendant concerning the elements of the crime was the court's statement that the charge was that Lacy "very, very briefly took Mr. Billup's car without his consent." The court made no mention of the specific intent element of the crime of theft, i.e., the intent to deprive Billup of the car, but, to the contrary, implied that no specific intent was required to commit the offense. In

addition, the statements made by Elbee Billup, the alleged victim of the crime tended to refute the elements of the crime, and should have prompted the court to examine more thoroughly the defendant's understanding of the crime to which he was pleading guilty. Although the court was not constitutionally obligated to determine that an adequate factual basis existed to support the plea,[10] it was obligated to determine that the guilty plea was made voluntarily and understandingly. Under these circumstances, it is evident that Lacy was not given an explanation and did not evince an understanding of the true nature of the charge to which he pled guilty. Accordingly, the resulting conviction cannot be used to support a habitual criminal conviction.

The judgment of the Colorado Court of Appeals is reversed, and the cause is remanded with directions to remand to the trial court for imposition of a sentence of four years imprisonment, the alternative sentence imposed by the trial judge in the event the habitual criminal adjudication were to be reversed on appeal.

JUSTICE VOLLACK concurs in part and dissents in part; and JUSTICE ROVIRA and JUSTICE MULLARKEY join in the concurrence and dissent.

JUSTICE VOLLACK concurring in part and dissenting in part:

I agree with the majority's finding that the defendant has made a prima facie showing of the constitutional invalidity of his 1976 guilty plea. I write separately, however, because I

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[10] The record contains no indication that Lacy entered the type of plea discussed in North Carolina v. Alford, 400 U.S. 25 (1970).

disagree with the majority's conclusion that Lacy made a prima facie showing that he lacked an understanding of the nature and critical elements of second degree assault when he entered a guilty plea in 1980. I therefore dissent to Part III.A., and concur in the remainder of the majority opinion.

Lacy was represented by counsel at the providency hearing. The majority notes that Lacy's counsel had been provided with a copy of the information. The information charged Lacy with the "knowing assault" of his victim "with intent to commit the felony of Second Degree Rape." See Noel v. Idaho, 113 Idaho 92, ___, 741 P.2d 728, 730 (Idaho App. 1987) ("A defendant must be informed of the intent element before a guilty plea can be regarded as voluntary. This requirement may be met when the information, referring to the intent element, is read to the defendant.") The trial court said to Lacy: "You are appearing here with your attorney, . . . you have talked to him about this; you understand the charge?" Lacy responded in the affirmative. It is true that the court did not specify that the charge to which Lacy was pleading guilty was second degree assault "with intent to commit the felony of second degree rape." There was, however, a discussion on the record and in the presence of Lacy and his counsel regarding the disposition of the case and the filing of a "Sexual Psychopathy Petition."[1] The parties

[1] A Washington statute provides that if a court finds reasonable grounds to believe that a defendant is a sexual psychopath, "the court shall order said defendant confined at the nearest state hospital for observation as to the existence of sexual psychopathy" for a period not to exceed 90 days. Wash. Rev. Code §71.06.040 (1987); see In re Knapp, 102 Wash. 2d 466, ___, 687 P.2d 1145, 1148 (1984); State v. Wilmoth, 22 Wash. App. 419, ___, 589 P.2d 1270, 1271 (1979).

agreed that a petition in sexual psychopathy would be filed and that Lacy would be sent for the 90-day evaluation.

Most significantly, the prosecuting attorney entered a detailed account of the assault that included the information that Lacy had pulled the victim into his car "and she struggled and . . . he then choked her with his hands around her neck, and she lost consciousness." When the victim regained consciousness she awoke to find her assailant sitting in the car masturbating; he again attempted to attack her and she again struggled. "Threats were made that she should comply with his demands or she would be killed, and she then stopped struggling and he was able to partially remove her blouse by unzipping it, and, again, to take her pants down to her ankles."

> Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

Henderson v. Morgan, 426 U.S. 637, 647 (1976), quoted in Marshall v. Lonberger, 459 U.S. 422, 436 (1982).

Considering the record as a whole, I would conclude that the defendant sufficiently understood the mental state element of the charge--that he intended to commit rape when he assaulted Annette Muse. The prosecutor's presentation of the factual basis for the charge established the sexual nature of

the assault in detail.[2] "Upon hearing this information, the defendant did not protest or attempt to withdraw his earlier guilty plea." People v. Adrian, 701 P.2d 45, 48 (Colo. 1985). We came to a similar conclusion in People v. Scheer, 184 Colo. 15, 518 P.2d 833 (1974), where we held:

> The record in this case indicates that after the court accepted the guilty pleas the prosecution proceeded to state to the court and the jury a summary of the prosecution's evidence in the case, which included a full statement about the attempted holdup and shooting. Defendant Scheer and his counsel were present in the courtroom for this recitation and no objection was made. . . . We find that there was a factual basis in the record for the plea in this case and that defendant understandingly made his plea.

Id. at 21, 518 P.2d at 835-36. In addition, the defendant was present for discussions on the record with his attorney

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[2] [T]he record of the providency hearing shows that the Florida court neither advised defendant of the elements of the offenses nor read the information to him. However, the testimony of the defendant and the statements of the defendant's counsel clearly reveal that the defendant knew and understood the elements of the charge.

> The record of the providency hearing is sufficient to show that defendant understood the critical elements of the offenses to which he pled guilty.

People v. Henderson, 745 P.2d 265, 267 (Colo. App. 1987), cert. denied, (Oct. 5, 1987).

concerning the filing of a petition of his sexual psychopathy evaluation. Again, he did not protest. Based on this, I cannot conclude that the defendant did not understand the sexual nature of the assault charge. We have noted that "a factual basis may be established by the record as a whole" in concluding that reports by two psychiatrists plus the affidavit accompanying the information were sufficient to establish the factual basis for a plea. Wilson v. People, 708 P.2d 792, 798-99 (Colo. 1985). I would find that the defendant was sufficiently aware of the nature of the charge to enter a knowing and voluntary plea of guilty.

The effect of the majority's holding is to create a "form over substance" application of Crim. P. 11 as it applies to specific intent crimes. Lacy conceded that he assaulted the victim, thus establishing the first element of the crime. I believe that the intent element--intent to commit second degree rape--was understandable from a reading of the information and from the totality of the proceedings in the record. The trial court is not required to follow a "formal ritual." People v. Wade, 708 P.2d 1366, 1368 (Colo. 1985). The defendant conceded that he had spoken with his attorney and that he understood the charge. I therefore concur in part and dissent in part.

I am authorized to say that JUSTICE ROVIRA and JUSTICE MULLARKEY join in this concurrence and dissent.

APPENDIX D

SUPREME COURT, STATE OF COLORADO
CASE NO. 87SC262
CERTIORARI TO THE COLORADO COURT OF APPEALS, #85CA1264
DISTRICT COURT, JEFFERSON COUNTY, #85CR249

ORDER OF COURT

JOHN WESLEY LACY,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

Upon consideration of the Petition for Rehearing filed by the Respondent in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that Opinion is modified and, as modified, said Petition for Reheairng shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 5, 1989.
Justices Erickson, Vollack and Mullarkey would grant.

cc: Honorable Winston W. Wolvington
%Honorable Gaspar F. Perricone, Chief Judge
Hall of Justice
1701 Arapahoe Street
Golden, Colorado 80401-6199

Judy Fried
Deputy State Public Defender
Robert M. Russel
Assistant Attorney General

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

(2)

NO. 89-247

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

THE STATE OF COLORADO,

Petitioner

v.

JOHN WESLEY LACY

Respondent

On Writ of Certiorari to

the Supreme Court of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID F. VELA
Colorado State Public Defender

JUDY FRIED
Deputy State Public Defender

THOMAS M. VAN CLEAVE III
Deputy State Public Defender
(A Member of the Bar of This Court)

COUNSEL FOR RESPONDENT
110 Sixteenth Street,
Suite 800
Denver, Colorado 80202
620-4888

32 pp

QUESTION PRESENTED FOR REVIEW

Should this Court review the correctness of the decision of the Colorado Supreme Court invalidating, for purposes of enhancement of sentence, two guilty pleas in which the court, in accepting the pleas, failed to inform Mr. Lacy of the nature of the charges to which he was pleading guilty.

NO. 89-247

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

THE STATE OF COLORADO,

Petitioner

v.

JOHN WESLEY LACY

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner (who was the Respondent in the State Supreme Court below) will be referred to as the State or as the prosecution. Respondent (who was the Petitioner in the State Supreme Court) will be referred to by name.

STATEMENT OF THE FACTS

I. Proceedings Below

John Lacy was charged in Jefferson County, Colorado, with the offense of attempted kidnapping[1] and third degree assault.[2] The charging document was amended to add four counts of prior felony convictions, pursuant to the Colorado Habitual Criminal Offender Act.[3] Upon Mr. Lacy's motion and a hearing on the validity of the previous convictions, the trial court dismissed one of Mr. Lacy's prior convictions. The remaining three felonies consisted of operating an automobile without the owner's

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1. Secs. 18-3-302 and 18-2-101, 8B Colo. Rev. Stat. (1986). Under these sections the kidnapping offense with which Mr. Lacy was charged is a class 5 felony, the least serious felony in Colorado. Sec. 18-1-105, supra.

2. Sec. 18-3-404, 8B Colo. Rev. Stat. (1986). As charged in this case, third degree assault is a class 1 misdemeanor.

3. . Sec. 16-13-101, 8A Colo. Rev. Stat. (1986).

consent (commonly known as "joyriding");[4] theft, and second degree assault. Mr. Lacy was found guilty by the jury of the kidnapping and assault charges, and was also found previously to have been convicted of the three felonies. In the alternative to the mandated sentence of life imprisonment pursuant to the habitual criminal statute, the trial court imposed a sentence of four years on the kidnapping conviction in the event the habitual criminal sentence was declared invalid on appeal. The prosecution expressed no opposition to the alternative sentence.

The Colorado Court of Appeals affirmed Mr. Lacy's convictions and sentences.[5] The Colorado Supreme Court granted certiorari, and, held[6] that two of the convictions--a 1976 Ohio theft conviction and a 1980 Washington assault conviction--upon which the habitual criminal findings were predicated were invalid.[7] Unanimously holding the Ohio conviction to be unconstitutionally obtained, the Supreme Court invalidated the Washington conviction by a four to three majority.

ARGUMENT

I. THE COLORADO SUPREME COURT CORRECTLY APPLIED PRECEDENTS OF THIS COURT AND ITS DECISION THAT THE GUILTY PLEAS WERE INVALID NEED NOT BE REVIEWED BY THIS COURT.

A. THE 1976 OHIO GUILTY PLEA TO THEFT.

Mr. Lacy was incarcerated at the time he entered his plea to theft. In return for his plea of guilty he was placed on probation; he received no other concessions for his plea.[8] The

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4. Joyriding is not a felony in Colorado. See Sec. 18-4-409(4), 8B Colo. Rev. Stat. (1986).

5. People v. Lacy, No. 85 CA 1264 (Colo. App. May 14, 1987) (Not Selected for Publication).

6. Lacy v. People, 775 P.2d 1 (Colo. 1989).

7. Because a minimum of two convictions are necessary in order to enhance a sentence under the Colorado habitual criminal statute, the court declined to address the validity of the remaining conviction. If that conviction were invalid, a determination by this Court that only one of the convictions found invalid by the Colorado Supreme Court was in fact valid, would not affect Mr. Lacy's sentence.

transcript of the providency hearing further reveals that although defense counsel had agreed to the plea agreement on behalf of Mr. Lacy, counsel's main role at the plea hearing was to "bring to the court's attention" the presence of the victim, Elbee Billup, who stated:

> As long as [Lacy] agreed to pay the damage to my car, naturally, I don't want to press charges against him, because I have let him have the car. He used the car without my consent before, but not this particular time. So I won't press charges against him, if it please the Court.[9]

Ohio Tr. at 4.

After the prosecutor had read the charge as contained in the indictment, the trial court then engaged in the following exchange with Mr. Lacy:

> [THE COURT]: All right, Mr. Lacy, the charge here is a felony of the fourth degree; it's the less serious of all of our felonies. However, it is still a serious charge. And the charge is, as [the prosecuting attorney] has stated, that you very, very briefly took Mr. Billup's car without his consent on the 7th of November?
> [MR. LACY]: Right.

Ohio Tr. at 4.

In neither this advisement, nor in the prosecutor's reading of the charge was Mr. Lacy ever informed of the specific intent element of the offense to which he pleaded guilty.

Basing its decision solely on the Colorado law, the Colorado Supreme Court held unanimously that "[u]nder these circumstances, it is evident that Lacy was not given an explanation and did not evince an understanding of the true nature of the charge to which he pled guilty." Lacy v. People, 775 P.2d at 9.

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8. Transcript of providency hearing in the Court of Common Pleas, Mahoning County, Ohio at 2-3 [hereinafter Ohio Tr.]. This transcript is designated "Appendix A."

9. The prosecution characterizes this statement as "ambiguous," Pet. for Cert. at 8, n.4, and hypothesizes that if Billup's statement were true, "trial would have been a simple matter." Id. While trial might have been a simple matter, awaiting a trial in jail might not have been. Thus, motives other than guilty might have persuaded Mr. Lacy to accept the plea agreement. Cf. North Carolina v. Alford, 379 U.S. 952 (1970). The Ohio prosecutor did not dispute Billup's statement. Ohio Tr. at 4.

A. THE 1980 WASHINGTON PLEA TO SECOND DEGREE ASSAULT.

In Spokane County, Washington, Mr. Lacy was charged with the offense of second degree assault. (Transcript of providency hearing in Superior Court of Spokane County, Washington at 2 [hereinafter Wash. Tr.].[10] According to the district attorney, Mr. Lacy was present with his attorney and they had been given a copy of the information. Wash. Tr. at 2. Defense counsel stated that he and the district attorney had agreed to waive the preliminary hearing, the filing of a sexual psychopathy petition, and a ten-day notice requirement for filing the petition. Wash. Tr. at 2-3. In response to questioning by the court, Mr. Lacy stated that he had "talked to [his attorney] about this" and that he understood the charge. Wash. Tr. at 3. The court told Mr. Lacy that he was accused of the crime of second degree assault and that the maximum sentence was ten years. Wash. Tr. at 3. The court then informed Mr. Lacy of the rights which would be waived by a plea of guilty. Wash. Tr. at 3-4. Upon then being asked, "How do you plead to the crime of Second Degree Assault as charged," Mr. Lacy responded, "Guilty." Wash Tr. at 4. After explaining the possible penalties for the offense of second degree assault, the court stated, "You were asked to state in your own words what you did that caused this charge to be filed, and I find here: 'I choked Annette Nuns.'" Wash. Tr. at 5. The district attorney then read a factual statement upon which the charge was based. Wash. Tr. at 6. Finally, the court explained the procedure involved with the sexual psychopath petition and proceedings were adjourned. Wash. Tr. at 8-9.

Although the charge stated that the offense of second degree assault contained the element of intent to commit second degree rape, at no time during the plea hearing was Mr. Lacy told this, either by the court, his attorney or the prosecuting attorney. After noting that "[t]he record contains no showing that the court made even a general effort to explain the mental states

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10. This transcript is designated "Appendix B."

critical to the offense of second degree assault or to describe in any way the elements of the crime of second degree rape," the Colorado Supreme Court concluded that the plea was invalid for sentence enhancement purposes because the "defendant has made a prima facie showing that he lacked an understanding of the nature and elements of the crime of second degree assault" and "[t]he prosecution produced no evidence to carry its burden to show that the conviction was constitutionally obtained." Lacy v. People, 775 P.2d at 8.[11]

C. LEGAL BASIS FOR COLORADO SUPREME COURT'S DECISION

In order for a plea of guilty to be valid for sentence enhancement purposes in Colorado, the defendant must receive "'"real notice of the true nature of the charge against him."'" Lacy v. People, 775 P.2d at 4 (quoting Henderson v. Morgan, 426 U.S. 637, 645 (1976)) (quoting Smith v. O'Grady, 312 U.S. 329, 336 (1941)). In Lacy the Colorado Supreme Court noted that under Colorado decisional law "the record must affirmatively demonstrate the defendant's understanding of the critical elements of the crime to which the plea is tendered." Id., 775 P.2d at 5. Acknowledging this Court's statements in Morgan and in Marshall v. Lonberger, 459 U.S. 422 (1983) that in some circumstances it may be presumed that a defendant has been adequately informed by his lawyers or otherwise of the charges to which he is pleading guilty, the court then stated: "However, a showing that defense counsel gave some explanation to his client of the charge to which the guilty plea is tendered does not by itself sufficiently demonstrate that the defendant knew the critical elements of the crime when the plea was entered." Lacy

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11. In Colorado, a defendant, when attacking a prior conviction based on a plea of guilty, has the initial burden to make a prima facie showing of invalidity. Upon such a showing, the burden shifts to the prosecution to show facts supporting the validity of the plea. See Watkins v. People, 655 P.2d 834 (Colo. 1982). A statement by defense counsel that he advised the defendant of the nature of the charges is sufficient to satisfy the prosecution's burden of of establishing validity of a plea. People v. Lesh, 668 P.2d 1362 (Colo. 1983).

v. People, 775 P.2d at 6. It is this narrow point upon which the State has requested review by this Court. This statement by the Colorado court is not inconsistent with this Court's holdings in Morgan and Lonberger. As noted in Lacy, the Colorado Supreme Court explicitly recognizes the presumption that counsel has explained to his client the nature of the offense so that he knows the offense to which he is admitting guilt. However, in this case the court found the presumption to have been overcome by facts appearing in the plea hearings.

In the Ohio plea the absence of an advisement of any of the elements of the offense together with the statement of the complaining witness tending to indicate that Mr. Lacy did not have the requisite intent to render him guilty of the charged offensse, apparently was considered sufficient to overcome the presumption that Mr. Lacy had been informed of the critical elements of the charge by his attorney or otherwise. And in the Washington plea the failure of the court to inform Mr. Lacy of any of the elements of the offense and the fact that the offense included a specific intent to commit another crime, the elements of which also were unexplained, were apparently sufficient to rebut the presumption that Mr. Lacy had been informed of these elements by his attorney.

In reviewing the constitutional validity of guilty pleas, the Colorado Supreme Court has routinely refused to hold the trial court to a formalistic litany in advising a defendant of the nature of the charges. People v. Leonard, 673 P.2d 37 (Colo. 1983). The Colorado court has followed McCarthy v. United States, 394 U.S. 459, 465 (1965), holding that a lack of factual basis alone for a plea alone is not a due process violation. Lacy, 775 P.2d at 5. Likewise the Colorado Supreme Court has rejected assertions that the absence of any reference to the prosecution's burden of proof in criminal trials invalidates the guilty plea. People v. Wade, 708 P.2d 1366, 1370 (Colo. 1985). Even in cases where the three constitutional rights enumerated in

Boykin were absent from an advisement, the plea was not necessarily invalid. Id, 708 P.2d at 1369. Rather, the record as a whole must simply show that the defendant entered his guilty plea voluntarily and understandingly. Id., 708 P.2d 1368-69.

In the ten guilty plea cases reviewed in the past five years, by the Colorado Supreme Court under the principles announced in Henderson v. Morgan, the guilty pleas were upheld in seven. In City of Colorado Springs v. Forance, 776 P.2d 1107 (Colo. 1989), a post-Lacy decison, a cursory advisement on a traffic summons and complaint was sufficient to give notice of the statutory elements of the offense); in People v. Trujillo, 731 P.2d 649 (Colo. 1986), the reading of the information was sufficient to advise the defendant of the nature of the offense; in People v. Chavez, 730 P.2d 321 (Colo. 1986), the record was sufficient to show defendant's understanding of the penalty); and in People v. Hrapski, 718 P.2d 1050 (Colo. 1986), the court held that in determining whether a guilty plea is made knowingly and voluntarily no formal ritual need be followed by the trial court; and in Wilson v. People, 708 P.2d 792 (Colo. 1985), the term feloniously appearing in the information sufficiently informed the defendant of the requisite mens rea and hence defendant was adequately advised; in People v. Cabral, 698 P.2d 234 (Colo. 1985), the defendant's guilty plea to first degree assault was properly received where the reading of the information provided a sufficient record to demonstrate that the defendant understood the nature of the offense; in Ramirez v. People, 682 P.2d 1181 (Colo. 1984),the record sufficiently demonstrated that the defendant understood nature of crime of attempted possession.

D. THERE ARE NOT SUFFICIENT REASONS FOR GRANTING A WRIT OF CERTIORARI.

In its Petition the State asserts that the Colorado court's decision in Lacy will undermine several important advantages of the use of guilty pleas. The State asserts that "[u]nder Lacy,

it is more important for judges to say certain words during advisements that to ascertain whether defendant's actually under stand what they are facing." Pet. for Writ of Cert. at 13. As pointed out above, the Colorado court has eschewed the requirement of a formalistic litany in advising pleading defendants of the nature of the charges to which they are pleading. See Wade, 708 P.2d. at 1368.

The State also decries the effect of Lacy in overturning guilty pleas "years after a plea is made." Pet. for Cert. at 13. Lacy certainly will not have this effect in Colorado. Under section 16-5-402, 8A Colo. Rev. Stat. (1986), except in limited circumstances, a guilty plea in a non-capital felony must be collaterally attacked within three years following conviction. See People v. Fagerholm, 768 P.2d 689 (Colo. 1989).

Finally, the State asserts that "Lacy erodes the respect which is normally accorded the judgments of sister states and makes conflict between the states more likely." Pet. for Cert. at 15. However, the State overestimates the effect of the ruling in Lacy. The ruling of a Colorado court on the validity of a conviction in another state has no effect on that state's judiciary. Moreover, under Colorado decisional law a ruling on a collateral attack on a plea of guilty sought to be used for enhancement purposes constitutes only an evidentiary ruling and is not subject to the operation of the doctrine of collateral estoppel. Wright v. People, 690 P.2d 1257 (Colo. 1984). Thus, under Colorado law, a ruling in a particular case excluding the use of a prior conviction for sentence enhancement purposes on the ground of the invalidity of a guilty plea is not binding on any other court in a different proceeding.

CONCLUSION

It is respectfully submitted that the decision of the Colorado Supreme Court in this case is substantially correct and substantially in accordance with principles established by decisions of this Court. Accordingly, there is no need for further review of the Colorado Supreme Court's decision by this Court.

DAVID F. VELA
Colorado State Public Defender

JUDY FRIED
Deputy State Public Defender

THOMAS M. VAN CLEAVE, III
Deputy State Public Defender
(A Member of the Bar of this Court)

ATTORNEYS FOR RESPONDENT
110 Sixteenth Street, Suite 800
Denver, Colorado 80202
620-4888

CERTIFICATE OF SERVICE

I, Thomas M. Van Cleave III, a member of the Bar of the Supreme Court of the United States and counsel of record for John Wesley Lacy, Respondent herein, certify that on October 5, 1989, I served one copy of the attached Brief in Opposition to the Petition for Writ of Certiorari, on the Honorable John D. Dailey, Deputy Attorney General, for the State of Colorado, counsel for Petitioner, by hand-delivery to the address as follows:

John D. Dailey
Deputy Attorney General
1525 Sherman Street
Third Floor
Denver, Colorado 80203

John Milton Hutchins
First Assistant Attorney General
1525 Sherman Street
Third Floor
Denver, Colorado 80203

Thomas M Van Cleave III

CERTIFICATE OF MAILING

I, Thomas M. Van Cleave, III, a member of the Bar of the Supreme Court of the United States and counsel of record for John Wesley Lacy, Respondent herein, certify that on October 5, 1989, I deposited in the United States Mails, postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, the foregoing Brief in Opposition to Petition for Writ of Certiorari and Motion to Proceed in Forma Pauperis Without an Affidavit of Indigency.

Thomas M Van Cleave III

APPENDIX A

STATE OF OHIO)
) SS.
MAHONING COUNTY)

IN THE COURT OF COMMON PLEAS

CASE NO. 75-CR-759

STATE OF OHIO

Plaintiff

-vs-

JOHN LACY

Defendant

TRANSCRIPT OF PROCEEDINGS

GUILTY PLEA

APPEARANCES:

On behalf of the State of Ohio:
Thomas Zena, Asst. Prosecutor
Court House, 3rd Floor
Youngstown, Ohio

On behalf of the Defendant:
John Breckenridge, Esq.
402 Legal Arts Centre
Youngstown, Ohio

BE IT REMEMBERED that at the trial of the above-entitled cause, in the Court of Common Pleas, Mahoning County, Ohio, beginning on the 11th day of February, 1976, and continuing thereafter, as hereinafter noted, before the HONORABLE CLYDE W. OSBORNE, the above appearances having been made, the following proceedings were had:

DEFENDANT'S EXHIBIT 3 E-17-85

P R O C E E D I N G S

MR. ZENA: May it please the Court, your honor, we're here today on Case No. 75-CR-759, State of Ohio versus John Lacy. Your honor, Mr. Lacy has been indicted by the Mahoning County Grand Jury, the September Term of the Grand Jury stating that on or about November 7, 1975, with purpose to deprive the owner, Elbee Billup, 1090 Griffith Street, Apartment 467, Youngstown, Ohio, of a 1964 Pontiac Catalina, bearing Ohio Registration No. J-387-K, knowingly obtained or exerted control over said property without the consent of Elbee Billup, or a person authorized to give consent, the value of said property being more than $150.00, in violation of 2913.02 (A)(1).

Your honor, this defendant is in court represented by Attorney Breckenridge and that the prosecution, State of Ohio, is represented by Attorney Tom Zena. I have gone through extensive negotiations with Mr. Breckenridge. Also, your honor, another charge against Mr. Lacy--and I'll tell this to the defendant--has been no billed by the Grand Jury through the efforts of his counsel. As part of the plea negotiations, your honor, Mr. Breckenridge informed me that this defendant would plead as charged, a felony of the fourth degree, carrying a possible punishment of six months, one,

one and one-half to two to five years. At the recommendation of the State of Ohio, after such plea is accepted, we would make a recommendation for probation, which the prosecuting staff would not be opposed, nor would the recommendation of probation be opposed.

MR. BRECKENRIDGE: Your honor, if it please the court, I would also like to bring to the Court's attention that Mr. Elbee Billup, the man who owned the particular car, is here in court. And I think it would help the Court and also the probation office in later proceedings if the Court would interrogate Mr. Billup and take a statement. I think he's already talked to Mr. Zena.

MR. ZENA: Your honor, for the purposes of the record, I'll concur and stipulate for the purpose of the record that Mr. Billup has personally come into my office and told me about various efforts of the defendant to make restitution in this matter. Further, Mr. Billup requested of me on numerous occasions that this charge be dismissed against this defendant and personally requested as a favor that it be done because of Mr. Lacy's efforts at restitution and Mr. Lacy's very strong cooperation with Mr. Billup.

THE COURT: Is there anything that you would

like to say in addition to that?

MR. BILLUP: No, I have nothing to say.

THE COURT: Is this a fair summary of what the transaction has been?

MR. BILLUP: As long as he agreed to pay the damage to my car, naturally, I don't want to press charges against him, because I have let him have the car. He used the car without my consent before, but not this particular time. So, I won't press charges against him, if it please the Court.

THE COURT: Thank you.

BY THE COURT:

Q All right, Mr. Lacy, the charge here is a felony of the fourth degree; it's the less serious of all of our felonies. However, it is still a serious charge. And the charge is, as Mr. Zena has stated, that you very, very briefly took Mr. Billup's car without his consent on the 7th of November?

A Right.

Q And, of course, if you did that, then you are guilty of this crime. By pleading guilty to it, you put yourself in a position where you are subject to a sentence of imprisonment of not less than six months, nor more than

five years. Now this can be six months, one year, one and one-half years up to two years and a maximum of five years, do you understand that?

A Yes.

Q Do you understand that by pleading guilty you put yourself in a position where I can immediately impose sentence upon you. I'm not going to do that, because I understand there is going to be a probation request, but you understand that I can?

A Yes.

Q I'm sure Mr. Breckenridge told you that you are entitled to a trial by jury. And, of course, you waive that by pleading guilty. You waive a lot of other rights that are concurrent with that; the first that you have a right to be present at all times during the trial, with your lawyer, the right to cross examine witnesses who testify against you, or at least face them while they accuse you. That is the right to confront witnesses. Then you have the right to require witnesses to come in on your behalf, if you have any, the right to compulsory process. You are presumed to be innocent of this charge, and that presumption of innocence protects you through the trial until the jury removes it or the State has proved your guilt by the degree

of proof which is called beyond a reasonable doubt, the highest degree of proof in our law. If you go to trial, of course, you cannot be compelled to testify or take the stand, either in your own behalf or against yourself. And if you don't, the prosecuting attorney and the Court and everyone else is forbidden to make any comment on your failure to testify to your disadvantage. Do you have any questions so far?

A No, sir.

Q Now if you would go to trial, Mr. Lacy, and are convicted, then the law of Ohio and the Rules of Criminal Procedure say that you have the right to appeal the conviction to the Court of Appeals. And if you don't have the money to hire a lawyer or pay the cost of the appeal, these things will be taken care of for you. Of course, a plea of guilty would eliminate that particular provision. Do you understand everything I have said up to now?

A Yes.

Q In view of what I have told you, do you want to waive these rights and change your plea to guilty to this charge, Mr. Lacy?

A Yes.

Q Are you doing this voluntarily?

A Yes, sir.

Q Has anyone threatened you or tried to coerce you to make you plead guilty?

A No, sir.

Q Has anybody promised you anything, other than what's been said here today, about not opposing probation and so forth?

A No, sir.

Q So I understand that you are doing this completely of your own free will?

A Yes, sir.

Q Do you have any questions at all up to now?

A No, sir.

Q Fine. Now I see that you have signed this paper and that's your signature?

A Yes.

Q And Mr. Breckenride witnessed it. I'll accept the plea of guilty and refer the application for probation to the Adult Parole Authority and continue the bond.

THE COURT: This is, of course, for Judge Bannon?

MR. ZENA: Yes. The probation report will be a minimum of 12 weeks. (Hearing concluded)

REPORTER'S CERTIFICATE

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the foregoing cause, and that this is a correct and complete transcript of same.

Angelo G. Abbatti

OFFICIAL COURT REPORTER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff, v. JOHN WESLEY LACY, JR., Defendant.	NO. 80-1-00413-2 Before the HONORABLE DONALD N. OLSON, Judge.

APPEARANCES:

For the Plaintiff: Mr. Daniel Short
Deputy Prosecuting Attorney
Public Safety Bg.
Spokane, WA. 99260

For the Defendant: Mr. Gary Hemingway
Asst. Public Defender
Spokane County Courthouse
Spokane, WA. 99260

GUILTY PLEA

MORNING SESSION
6/6/80

THE COURT: Mr. Short.

MR. SHORT: Good morning, Your Honor.

Please the Court and Counsel, this is the time set for the hearing on the case of State of Washington versus John Lacy, Jr.; cause number 80-1-00413-2. On the 28th of May, 1980, before this Court, an Information was filed charing the defendant with Second Degree Assault. At that time Mr. Lacy appeared with counsel, Gary Hemingway, and entered a plea of not guilty. Trial was scheduled for June 4th. On June 4th a decision was made not to enter the plea, Your Honor. The trial was then scheduled for the next day and based on negotiations, Mr. Lacy has made a decision now to come before the Court and enter a plea of guilty.

He is before the Court with his counsel, Gary Hemingway, the warrant has been read; they have received a copy of the Information. I might indicate also, Your Honor, that the Court does have a copy of the State's Petition alleging sexual psychopathy, and the defendant is aware of this and I believe agrees with the Petition being filed.

MR. HEMINGWAY: That's correct, Your Honor. Mr. Lacy and myself have signed a stipulation waiving preliminary hearing on it, sexual psychopathy petition, and the require-

ment of a ten-day service of the petition ten days prior to any hearing.

MR. SHORT: I will hand this up, Your Honor.

(Mr. Short presents document to the Court).

THE COURT: Mr. Lacy, would you stand, please.

Mr. Lacy, you're 33 years old?

MR. LACY: Yes, sir.

THE COURT: Your true name is John Wesley Lacy, Jr.?

MR. LACY: Yes, sir.

THE COURT: You are appearing here with your attorney, Mr. Hemingway; you have talked to him about this; you understand this charge?

MR. LACY: Yes, sir.

THE COURT: You know that you're accused of the crime of Second Degree Assault, and that the maximum sentence for this is ten years?

MR. LACY: Yes.

THE COURT: In prison or a $10,000.00 fine or both?

MR. LACY: Yes.

THE COURT: You have a right to have a trial by jury; you have a right to have a lawyer for such a trial; if you can't afford one, one would be appointed at no expense to you; you have the right to hear and question witnesses who testify against you; the right to call witnesses to testify for you, they can be called at no expense to you; you would have the

right to testify or remain silent at the trial as you saw fit: the State would have to prove the charges beyond a reasonable doubt; and if you were convicted, you would have the right to appeal.

You understand all those rights?

MR. LACY: Yes, sir.

THE COURT: If you plead guilty, there is no trial and you waive those rights.

MR. LACY: Yes, sir.

THE COURT: How do you plead to the crime of Second Degree Assault as charged?

MR. LACY: Guilty.

THE COURT: Do you make the plea freely and voluntarily?

MR. LACY: Yes, sir.

THE COURT: No one has threatened harm of any kind to you or anybody else to cause you to make the plea?

MR. LACY: No, sir.

THE COURT: No one has made any promises, other than you understand the prosecuting attorney will file a Sexual Psychopathy Petition?

MR. LACY: Yes, sir.

THE COURT: That's the only agreement you have with the prosecutor?

MR. LACY: Yes, sir.

THE COURT: You understand that while the prosecutor may

make a recommendation to the Court for sentencing, the Court doesn't have to follow those recommendations. Should you be sentenced to prison the judge has to sentence you to the maximum term, which is ten years. The Board of Prison Terms and Paroles sets the minimum term.

You were asked to state in your own words what you did that caused this charge to be filed, and I find here:

"I choked Annette Nuns".

Is this your statement?

MR. LACY: Yeah. I spelled it wrong.

THE COURT: Oh, is it?

MR. LACY: (Examines document) Oh, M-U-S-E. Okay.

THE COURT: And is this your signature on the statement you handed up?

MR. LACY: Yes.

THE COURT: All right. You may be seated.

Mr. Short.

MR. SHORT: Very briefly, Your Honor.

The facts of the case are that during the early morning hours of March 6, 1980, Annette Muse, the victim in this case, was 20 years old and she met Mr. Lacy at Dr. Johns in Spokane County, and they were there with other friends, and these friends left and Annette had no way home. She was going to call a cab and Mr. Lacy offered her a ride home.

She met Mr. Lacy on at least one other occasion several

months before this.

She accepted a ride home and gave Mr. Lacy directions to an apartment house just north of Ferris High School and Mr. Lacy drove her directly from downtown Spokane to the apartment house parking lot. At the parking lot she started to leave the car to go up to the apartment. Mr. Lacy asked her to wait a minute. She was then pulled back into the car and he attempted to kiss her and she struggled and it is indicated he then choked her with his hands around her neck, and she lost consciousness. When she awoke she was laying in the front seat of the car on the floor and observed that there were a number of trees around the area. She believed the car had been moved, and she saw Mr. Lacy in the driver seat of the car masturbating, and when he saw her wake up he then went from his side of the car over to her side and, again, there was a brief struggle. Threats were made that she should comply with his demands or she would be killed, and she then stopped struggling and he was able to partially remove her blouse by unzipping it, and, again, to take her pants down to her ankles. She was then taken from the car out to a wooded area. They walked from the car and there, again, more demands were made, and threats were made. She did not comply and after some period of time she was able to calm the defendant down and they walked from the wooded area back to the parking lot where she called police.

They showed up and took a statement.

She received bruises about the neck and a bruise above her breast.

The incident in the wooded area took place very close to Ferris High School; it took place in Spokane County. There was no completion of a sexual act, Your Honor.

Also, Mr. Lacy, Your Honor, then did give a statement to detective Teigen, and indicated that he did check her but felt she was still conscious; that her pants were pulled down; that he did have occasion to place his mouth on her breasts; that he was masturbating, and it seems he feels that he had too much to drink and he got a little crazy.

That's the extent of the report.

THE COURT: Mr. Hemingway.

MR. HEMINGWAY: Yes, Your Honor.

At this time we would ask the Court to accept the guilty plea, and also Mr. Short and I discussed whether we needed a waiver of a PSI when we file a Sexual Psychopathy Petition.

THE COURT: I was going to ask you about that same question. I think that the rule is most likely to interpret it by the Supreme Court says you impose sentence and then suspend it if you want to send them out on a sexual observation, and, of course, if you impose sentence, even if you're going to suspend it, ordinarily you would have a pre-sentence. I thought I just might sign an order dispensing with it and if

we get back to imposing the sentence - I mean if the hospital doesn't examine him, I see no reason why you couldn't order a pre-sentence report at that time.

MR. HEMINGWAY: Then possibly I can prepare on.

THE COURT: Okay. All right. I have one; okay. No, that's all right. If you will just have him sign it there, Gary.

Mr. Lacy, would you stand again? (Defendant complies with request).

Mr. Lacy, you further understand part of the agreement before you made your plea, and what Counsel just indicated, that the prosecuting attorney has filed a Petition alleging that you may be a sexual psychopath, and ask that you be sent out to Eastern State Hospital for 90-days observation. Do you understand that?

MR. LACY: Yes, sir.

THE COURT: All right.

Now, based on your plea of guilty to the crime of Second Degree Assault, it is the finding and judgment of the Court that you are guilty. Do you know any reason why sentencing shouldn't be pronounced now?

MR. LACY: No, sir.

THE COURT: Do you have anything you would like to say, Mr. Lacy?

MR. LACY: No, sir.

THE COURT: Mr. Lacy, I would point out that the procedure which has been specified is that the Court impose sentence first and then suspend the sentence. Or suspend the execution of that sentence while the Sexual Psychopathy examination, or period, is while you're out at the Hospital. So it would be the judgment of the Court that you be committed to the Division of Institutions for a period not to exceed ten years. That would be suspended and, I guess, I need to specify a period of time there. So I would say five years, and this would be on the condition that you be referred to Eastern State Hospital for observation and determination under the sexual psychopath statutes, and if found to be a sexual psychopath, that you further comply with the treatment and courses that are recommended by the Hospital.

Okay. You may be seated.

I am signing the Judgment and Sentence and the Committment for 90-days observation in the presence of the defendant.

(WHEREUPON COURT ADJOURNED).

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October 5, 1989

Office of the Clerk
Supreme Court of the United States
Washington D.C., 20543

Dear Clerk of the Court:

Enclosed is the Brief in Opposition in the case State v. Lacy, No. 89-247. As discussed over the telephone with Mr. Lorenz, the brief is a few days late. The additional time was necessary to secure the appendixed documents.

Thank you for your courtesy.

Sincerely,

Judy Fried

Judy Fried
Deputy State Public Defender

JF/pa

cc: Robert M. Hutchins, First Assistant Attorney General
001

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 89-247

State of Colorado (Petitioner or Appellant) *vs.* John Wesley Lacy (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for John Wesley Lacy

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Thomas M Van Cleave III

(Type or print) Name Thomas M. Van Cleave III

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

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ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A

NO. 89-247

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE STATE OF COLORADO,

Petitioner,

v.

JOHN WESLEY LACY, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

BRIEF AMICI CURIAE OF THE STATES OF SOUTH DAKOTA, OKLAHOMA, ET AL.*

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QUESTION PRESENTED

WHETHER THE "REAL NOTICE OF THE TRUE NATURE OF THE CHARGE" TEST TO DETERMINE IF A GUILTY PLEA IS VOLUNTARY UNDER THE UNITED STATES CONSTITUTION WAS IMPERMISSIBLY EXPANDED TO REQUIRE AN ON-THE-RECORD EXPLANATION OF THE OFFENSE'S ELEMENTS?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE STATE OF COLORADO,

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Respondent.

INTEREST OF AMICI CURIAE

The states of South Dakota, Oklahoma, et al. submit this brief as Amici Curiae in support of the Petition for Writ of Certiorari filed by the State of Colorado. Colorado seeks review of the decision of the Colorado Supreme Court in Lacy v. Colorado, 775 P.2d 1 (Colo. 1989). In urging the Court to grant certiorari, the State of South Dakota is joined by additional

states.[1] The Amici States, individually and collectively, have a strong interest in the issues presented by the State of Colorado in its petition. In particular, they have an overriding interest in the proper test to determine if a plea of guilty is voluntary.

Guilty pleas are a prevalent part of the criminal process. A guilty plea can be challenged to determine whether the plea was voluntary. The voluntariness of guilty pleas can be challenged on direct appeal from the guilty plea, during a sentence enhancement proceeding, on a state post-conviction habeas petition, on a federal habeas petition, and perhaps in other proceedings.

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[1]This Brief of Amici Curiae is filed pursuant to Rule 36.4 of the rules of the Supreme Court. The additional Amici States are listed in the Appendix to this brief.

If the validity of a guilty plea must be relitigated, guidance is needed to determine the correct standard. All states in this Nation direct a tremendous amount of resources to defend challenges against the voluntariness of guilty pleas.

The states need some degree of finality to such determinations. Witnesses to crimes die. Defense attorneys, judges, court reporters, and other court personnel die or forget. Finality reinforces the integrity of the system. The Amici States therefore urge the Court to grant the State of Colorado's Petition for Writ of Certiorari, and reverse the judgment of the Colorado Supreme Court.

SUMMARY OF ARGUMENTS

The test to determine whether a plea of guilty is voluntary under the United States Constitution is whether the defendant had "real notice of the true nature of the charge against him." In this case, the Colorado

Supreme Court held that the defendant must have an "understanding of the critical elements of the crime" for a plea of guilty to be voluntary. Thus, the Colorado Supreme Court has expanded the test under the United States Constitution to determine whether a plea of guilty is voluntary. Such expansion conflicts with applicable decisions of this Court.

The "real notice of the true nature of the charge" test varies in interpretation among the circuit courts of appeal. Some courts have adhered closely to the traditional "real notice of the true nature of the charge" test. Other courts have expanded this test to include an explanation of the critical elements of the crime. One court requires explanation of <u>all</u> elements. Still another court requires the traditional rule plus a finding that the defendant knows his or her conduct actually falls within the

charge. Still other courts have applied different tests at different times. Therefore, this Court should address this issue to clear up the confusion among the various courts.

The courts in each of the states should give full faith and credit to the criminal convictions entered in a sister state. To preserve harmony among the states, and to carry out the full faith and credit clause, the states should accept a judgment of conviction in another state without conducting a full evidentiary hearing concerning validity of the judgment. Further, individual states should not be permitted to impose their views on federal constitutional law upon sister states, who stand as equals. Some degree of finality of criminal judgments is needed. Requiring states to accept such judgments when called for by their legislatures, under the doctrine

of full faith and credit, would promote finality.

ARGUMENTS

I

A COLLATERAL ATTACK ON AN APPARENTLY VALID PLEA OF GUILTY IS NOT PERMISSIBLE UNDER THIS COURT'S PRECEDENTS, UNLESS THE DEFENDANT WAS NOT INFORMED OF THE TRUE NATURE OF THE CHARGE AGAINST HIM.

This Court in Henderson v. Morgan, 426 U.S. 637 (1976) enunciated the test to determine whether a plea of guilty is voluntary. Specifically, the Henderson case stated that:

> the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." Smith v. O'Grady, 312 U.S. 329, 334 [1941].

Henderson, 426 U.S. at 645.

The test enunciated in Henderson is, simply enough, "real notice of the true

nature of the charge." Normally, the "real notice of the true nature of the charge" is satisfied by the colloquy between the trial court and the defendant during the process of taking the plea. Other methods are also available to show that the defendant understood the "real notice of the true nature of the charge":

> Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

Henderson, 426 U.S. at 467. See also Marshall v. Lonberger, 459 U.S. 422 (1983).

The Supreme Court of Colorado in Lacy v. Colorado, 775 P.2d 1 (Colo. 1989) misapplied the voluntariness of guilty plea test as set

forth by this Court in the Henderson case, and thus brought itself into direct conflict with this Court on a question of federal constitutional law. After the opening recitation of the facts, the Colorado Supreme Court set forth its views on guilty plea voluntariness. This recitation included the Henderson rule. Lacy, 775 P.2d at 4 [Appendix to Petition for Certiorari at 30 (hereinafter Pet.App.)]. The Colorado Supreme Court then took an extra step, not required by this Court nor by several other courts,[2] and stated the defendant must have an "understanding of the critical elements of the crime to which the plea is tendered." Lacy, 775 P.2d at 5 [Pet.App. at 32]

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[2] See Nelson v. Callahan, 721 F.2d 397 (1st Cir. 1983); Sober v. Crist, 644 F.2d 807 (9th Cir. 1981); Worthen v. Meachum, 842 F.2d 1179 (10th Cir. 1988).

(emphasis added). Based on this additional "elements" prong to the voluntariness of guilty plea test, the Colorado Supreme Court held that Lacy's prior criminal guilty pleas were involuntary. Lacy, 775 P.2d at 8-9 [Pet.App. at 38-42].

This Court's rule as set forth in the Henderson case requires no explanation of the elements to a defendant. The Henderson test requires that the trial court instruct defendant as to the "true nature of the charge against him." Henderson, 426 U.S. at 645. No mention is made of the elements of the crime. In fact, the Henderson Court assumed that "a description of every element of the offense" is not required. Henderson, 426 U.S. at 647 n. 18 (emphasis added).

The Colorado Court, on its own, has promulgated its own rule in conflict with the Henderson rule. Henderson states that "real notice of the true nature of the charge" can

be given in a number of ways. It can be delivered by defense counsel, by a reading of the indictment or information, by recitation of the factual basis of the crime, or by general discussion of the plea with the trial court. A separate listing of each and every element of the crime is not required by Henderson, 426 U.S. at 647, and, in fact, the other methods have been held sufficient. Marshall v. Lonberger, 459 U.S. at 436-37. No rote incantation is required, as Lacy seems to hold. Trial judges are not robots required to spew forth the elements of the crime to which a plea is entered. Through their conversations with defendants, courts will only accept the defendant's plea if voluntary. They are in the best position to determine whether the defendant is aware of what he is doing. The record need not contain magic words. Voluntariness can be determined in a number of ways.

This case is of considerable importance to the amici states because all of them are faced with application of habitual offender statutes years after prior convictions based upon pleas of guilty. If the Colorado Supreme Court's standards are adopted, it is likely that many guilty pleas will be invalidated and the states will be unable to apply their legitimate habitual offender statutes as intended. Those to whom habitual offender statutes are to be applied are those members of society most in need of punishment and most deserving of it. There are also significant public safety concerns in removing repeat offenders from society. The states do not seek to deprive those who have not understood their pleas of their rights. In this case, however, it is apparent that the question of what the defendant knew and when he knew it has taken a back seat to the requirement that there be a rote incantation

of magic words. Such a rule impedes the search for truth in the criminal justice system. See Williams v. Florida, 399 U.S. 78, 82 (1970).

The states also have a significant interest in the integrity of their criminal judgments. See Argument III.

The rule applied by the Colorado Court in this case is a significant break with prior precedent of this Court. If it were to be applied in other states, it would cause the retroactive invalidation of many guilty pleas by collateral attack long after they were finalized by expiration of time for appeal. Teague v. Lane, 109 S.Ct. 1060, 1072-73 (1989). This Court, even if inclined to apply the test set forth in Lacy (which these states vigorously oppose) should grant certiorari to clarify that guilty pleas will not be invalidated by this new rule until after the rule is announced.

II

INCONSISTENCY OF INTERPRETATION REQUIRES THIS COURT TO ESTABLISH A UNIFORM, EASILY APPLIED RULE.

The test for guilty plea voluntariness has been interpreted by many courts. Some courts seem to adhere closely to the "real notice of the true nature of the charge" test enunciated in Henderson. See Nelson v. Callahan, 721 F.2d 397, 400 (1st Cir. 1983); Sober v. Crist, 644 F.2d 807, 809 (9th Cir. 1981); Worthen v. Meachum, 842 F.2d 1179, 1183 (10th Cir. 1988). Some courts require both the Henderson "true nature of the charge" test and an explanation of the critical elements as well. See Gillard v. Scroggy, 847 F.2d 1141, 1143 (5th Cir. 1988); Paulson v. Black, 728 F.2d 1164, 1167 (8th Cir. 1984). At least one court requires the Henderson rule and all elements. See LoConte v. Dugger, 847 F.2d 745, 751 (11th Cir. 1988). At least one court uses the Henderson

"nature of the charge" test and may or may not use the elements test as well. See Berry v. Mintzes, 726 F.2d 1142, 1147 (6th Cir. 1984). Another court uses the rule that the "defendant must understand not only the nature of the charge against him or her, but also that his or her conduct actually falls within the charge." United States v. Frye, 738 F.2d 196, 199 (7th Cir. 1984). One court has apparently adopted two rules, one being the Henderson "true nature of the charge" rule, Matusiak v. Kelly, 786 F.2d 536, 543 (2d Cir. 1986), and has also used the Henderson rule and has required a description of the critical elements of the offense, Ames v. New York State Div. of Parole, 772 F.2d 13, 15 (2d Cir. 1985).

The above cases illustrate that there is division as to the proper test to determine if a guilty plea is voluntary. Guidance is needed in this ever expanding and important

area of criminal law. Judges, prosecutors, and defense attorneys need to be certain as to the proper requirements of a valid guilty plea.

III

FULL FAITH AND CREDIT SHOULD BE REQUIRED FOR CRIMINAL CONVICTIONS OF SISTER STATES WHEN THE FORUM STATE'S LEGISLATURE HAS ACKNOWLEDGED SUCH CRIMINAL CONVICTIONS FOR SENTENCE ENHANCEMENT.

Article IV, Section 1 of the United States Constitution directs that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The Colorado Supreme Court violated this provision when it refused to give full faith and credit to the guilty pleas of the sister states of Ohio and Washington. This type of violation will undermine the effectiveness and credibility of the judgments of sister states and will have a serious, negative

impact on habitual offender sentencing proceedings. The purpose of such statutes is to punish more severely offenders who continue to ignore the laws of the individual states. Therefore, this Court should reverse the decision because the action of the Colorado Supreme Court violated the full faith and credit clause of the Constitution.

The full faith and credit clause has consistently been applied in civil matters. Its application to matters of criminal law is less obvious because, in general, it is recognized that the criminal laws of a state, unlike the civil laws, have no extraterritorial effect--a state court will not enforce the criminal laws of its sister state. R.E. Cushman and R.F. Cushman, Cases in Constitutional Law, at 270 (3d ed. 1968). Where, however, a state recognizes criminal convictions of another state for purposes of enhancing the sentence of habitual criminals,

then the full faith and credit clause should be applied. This Court has recognized the discretionary authority of state legislatures to treat former imprisonment in another state as having the like effect as imprisonment in the state for purposes of showing that the offender is an habitual criminal. Carlesi v. New York, 233 U.S. 51, 58 (1914). Thus, the conviction, already obtained in the appropriate jurisdiction and recognized by the state legislature, should be given the proper respect by the sister state. If enforcement of a sister state's criminal laws is prohibited, collateral attack on a sister state's convictions should also be prohibited. The appropriate place to have attacked the convictions is in the forum state. Absent such a proceeding, the validity of the guilty pleas should not have been ruled upon by the Colorado Supreme Court.

It also recognized that full faith and credit for a state's judicial proceedings cannot be obtained in the court of other jurisdictions if those proceedings are wanting in due process. Old Wayne Mutual Life Ass'n. v. McDonough, 204 U.S. 8 (1907). In the present case, the basis of the Colorado Supreme Court's decision was its interpretation of the due process clause of the federal constitution. The Colorado Supreme Court extended Henderson beyond the parameters enunciated by this Court and applied its interpretation to the convictions of another state. Had the Colorado Supreme Court relied upon judicial interpretations of Henderson in the states from which the convictions arose, its reasoning would, perhaps, be justified. However, the Colorado Supreme Court has said it will accept criminal convictions of other states for purposes of enhancing criminal convictions in

accordance with its state law but that such convictions will be subjected to Colorado's interpretations and applications of federal constitutional law. Lacy, 775 P.2d at 3-7 [Pet.App. at 28-35]. If the Colorado Legislature accepts the judgments of sister states, then its courts should give those judgments full faith and credit.

As previously noted, the full faith and credit clause has generally been applied to matters of a civil nature. However, the application of the clause has previously been made to matters of criminal law. See Murray v. Louisiana, 347 F.2d 825 (5th Cir. 1965) (no violation of full faith and credit clause where Louisiana gave same effect to a Missouri pardon that a Missouri court would give); Groseclose v. Plummer, 106 F.2d 311 (9th Cir. 1939) (where Texas law not explicit on effect of pardon, no violation of full faith and credit where California included

pardoned offense in habitual criminal sentence since this procedure was allowed under California law). This Court is urged to explicitly extend the application of the full faith and credit clause to the situation now before it. The general justifications for the application of the clause have previously been stated by this Court.

In Marin v. Augedahl, 247 U.S. 142, 149 (1918), the Court stated:

> Whether the decision was right or wrong is not open to discussion here. If wrong it was subject to correction on proper application to the court which made it, or on appeal, but it was not void or open to collateral attack.

Further, this Court has said that courts of one state are not justified in denying full faith and credit to a judgment from a court of a sister state because the original court made a mistake of law, even in the law of the

second state. Fauntleroy v. Lum, 210 U.S. 230 (1908). The reasoning behind these decisions is sound and should be extended to apply to this case. The appropriate place to attack convictions from Ohio and Washington is in the courts of the States of Ohio and Washington, not in Colorado. See Michigan v. Doran, 439 U.S. 282, 290 (1978)(extradition warrant may not be challenged in courts of state holding fugitive, but may only be challenged in demanding state). The State of Colorado, having legislatively recognized the admissibility of criminal convictions from other states for purposes of enhancing the sentences of habitual criminal offenders, must presume validity of those convictions and grant them full faith and credit in their courts.

There is a necessity to preserve harmony between the states as well as order and law within the borders of those states. See

Doran, 439 U.S. at 290 (where judicial officer of demanding state has determined probable cause, courts of asylum state are without power to review determination). Extension of the Colorado Supreme Court's decision in Lacy would destroy that harmony and order in the enforcement of habitual offender sentences. Therefore, this Court is urged to specifically extend the application of the full faith and credit clause to the type of proceedings under review in this case.

CONCLUSION

For the reasons stated above, the amici states urge that the Court grant the State of

Colorado's Petition for a Writ of Certiorari and reverse the judgment of the Colorado Supreme Court.

Respectfully submitted,

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September 1, 1989

APPENDIX

APPENDIX

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No. 89-247

IN THE

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THE STATE OF COLORADO,
Petitioner,

vs.

JOHN WESLEY LACY, JR.
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF OF FIRST JUDICIAL DISTRICT ATTORNEY AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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14pp

QUESTION PRESENTED FOR REVIEW

Whether the Colorado Supreme Court erroneously held two guilty pleas to be constitutionally invalid because the trial court did not advise the defendent of critical elements of the crimes when defendant was represented by counsel who did advise defendant as to the charges.

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No. 89-247

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BRIEF OF FIRST JUDICIAL DISTRICT ATTORNEY AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS

The amicus curiae has a substantial interest in seeing this holding reviewed because he is the authorized law

enforcement officer of a political subdivision, a judicial district, of Colorado. This brief is filed pursuant to Rule 36.4 of the Rules of the Supreme Court.

The First Judicial District Attorney's Office, State of Colorado, is the office which prosecuted the Lacy case at the trial level and thus has a significant and particularized interest in the outcome of the case.

In line with the discretion vested in the district attorney and in consideration of respondent Lacy's substantial criminal history, this office filed habitual criminal counts along with new charges in 1985. Respondent was convicted by a jury of attempted kidnapping and third degree assault. Respondent was also convicted in a

bifurcated jury trial as a habitual criminal and given a life sentence. The immediate impact of the Colorado Supreme Court's decision, which found two of the underlying pleas on habitual criminal counts involuntary, was the release of the respondent from prison because he had served four years which was the alternative sentence imposed on respondent. This alternative sentence does not meet the public's interest in the protection of society nor in the deterrence and punishment of recidivists.

In addition, this office, as the prosecutor at the trial level, has a different perspective than the party petitioner because of the direct effect which the resolution of these issues will have on the daily resource allocation and charging decisions in this office.

REASONS FOR ALLOWING THE WRIT

This Court should issue a writ and review the holding of the Colorado Supreme Court because it has decided important questions of United States Constitutional Law with a far reaching impact on the finality of convictions and the state's ability to attack the recidivist problem, and it has done so in a way that conflicts with the decisions of this Court.

Henderson v. Morgan, 426 U.S. 637 (1976) and Marshall v. Lonberger, 459 U.S. 422 (1983) establish a presumption that a defendant, who is represented by counsel at the time of the entry of a guilty plea, has been informed of the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

At the proceedings where both of the pleas were entered which were held to be involuntary as a matter of law by the Colorado Supreme Court, the respondent was represented by counsel. The Colorado Supreme Court relegates its entire discussion of the Marshall-Henderson holdings, relating to counsel, to a footnote of its opinion. In fact the majority's only reference to Marshall is in the footnote while Henderson is cited for broad general purposes in the body of the opinion. Lacy v. People, 775 P.2d 1 at 8, N.8 (Colo. 1989).

More than misapplying Henderson and Marshall, the Lacy court ignored these holdings. The court appears to give no weight to a counseled, as opposed to an uncounseled, conviction but instead requires a ritualistic recitation by a

judge at the time of taking the plea. This is truly a "form over substance" approach.

The Colorado Supreme Court found both pleas to be constitutionally invalid because the critical elements of the crimes were not explained, on the record, to Lacy.

As to the 1980 Washington plea to second degree assault, Lacy had been given a copy of the information; he acknowledged, in the presence of his attorney, that he had spoken with his attorney and understood the charge; and Lacy and his attorney did not object to the prosecutor's factual account of the crime.

Concerning the 1976 Ohio plea to theft, Lacy and his attorney signed a written guilty plea agreement in which

they acknowledged that counsel had informed Lacy about the nature of the charge; the indictment was attached to the plea agreement and was read in open court.

As to both pleas, the advisements were complete as to the constitutional rights being waived and the possible penalties, and Lacy was examined about whether his pleas were voluntary.

The only evidence before the Colorado trial court at the hearing where Lacy challenged these prior pleas was the certified records and transcripts from Washington and Ohio. There was no testimony. Lacy never testified that he did not understand the charges nor did he testify that he would have chosen to go to trial if he had been more fully advised.

These records establish voluntary pleas under the controlling decisions of this Court. The Lacy decision is incorrect. The decision elevates and makes controlling formal litanies over any inquiry as to defendant's actual understanding of his plea.

There is no question that Lacy did the criminal acts, knowingly pled guilty, was convicted and sentenced, served time in prison for each conviction, and was paroled. Those facts are being repudiated by the Colorado Supreme Court in Lacy.

The cost imposed by the Lacy decision on the criminal justice system is great. Lacy upsets the finality of judgements and enables defendants to avoid the consequences of their prior convictions.

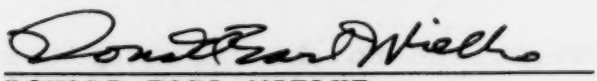
Most states' laws legitimately impose greater sentences on repeat offenders through the use of habitual criminal laws, higher felony classifications for second-time same crime offenders, and provisions which make recidivists ineligible for probation. The Lacy opinion enables defendants like Lacy with multiple convictions to be treated the same as first time offenders.

Given the importance of having counsel as set forth in the U.S. Constitution and as stressed by this Court, it is proper to presume that counsel has done his job especially when there is no evidence to the contrary.

CONCLUSION

Because of the significance of this case and its impact on the criminal justice system and because the Lacy opinion misinterprets, misapplies and ignores decisions of this Court, this Court should issue a writ of certiorari.

Respectfully submitted,

By 

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